

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT
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6
7 August Term, 2005
8

9 Argued: April 7, 2006

Decided: July 12, 2006

10 Errata Filed: September 6, 2006)

11 Docket Nos. 04-2746-cr, 04-4217-cr, 04-4429-cr, 04-2960-cr, 04-4842-cr, 04-5071-cr
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15 UNITED STATES OF AMERICA,
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17 *Appellee-Cross-Appellant,*
18

19 —v.—
20

21 PETER GOTTI,
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23 *Defendant-Appellant-Cross-Appellee,*
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25 ANTHONY CICCONE, also known as SONNY, RICHARD BONDI, RICHARD G. GOTTI,
26

27 *Defendants-Appellants,*
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29 PRIMO CASSARINO, JEROME BRANCATO, PETER PIACENTI, ANNA EYLENKRIG, THOMAS LISI,
30 CARMINE MALARA, JEROME ORSINO, FRANK SCOLLO, VINCENT NASSO, ANTHONY PANSINI,
31 JULES R. NASSO, SALVATORE CANNATA,
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33 *Defendants.*
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37 Before:
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39 FEINBERG and KATZMANN, *Circuit Judges,*
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1 and LYNCH, *District Judge*.^{*}

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4 Appeal from a judgment entered in the United States District Court for the Eastern District of
5 New York (Block, *J.*), convicting defendants of violating and conspiring to violate the Racketeer
6 Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1962(c) and (d), and of
7 committing numerous RICO predicate and substantive offenses. Affirmed in part; vacated and
8 remanded in part.
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32 *Appellant Richard G. Gotti* (on submission)
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36 KATZMANN, *Circuit Judge*:
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38 This case raises an issue of first impression for this Court: the scope of the Supreme

^{*}The Honorable Gerard E. Lynch, United States District Judge for the Southern District of New York, sitting by designation.

1 Court’s holding in *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393 (2003) (“*Scheidler*
2 *II*”),¹ in which the Supreme Court tightened the requirements for finding that a defendant has
3 committed extortion under the Hobbs Act, 18 U.S.C. § 1951. On appeal, the defendants-
4 appellants – Peter Gotti, Richard G. Gotti, Anthony (“Sonny”) Ciccone, and Richard Bondi –
5 argue that *Scheidler II* invalidates all of the Hobbs Act counts in this case that were premised on
6 the extortion of intangible property rights. We hold, however, that *Scheidler II* did not invalidate
7 the challenged extortion counts at issue in this case, because *Scheidler II* – far from holding that
8 a Hobbs Act extortion could not be premised on the extortion of intangible property rights –
9 simply clarified that for Hobbs Act liability to attach, there must be a showing that the defendant
10 did not merely seek to deprive the victim of the property right in question, but also sought to
11 obtain that right for himself. That standard, which can be satisfied regardless of whether the
12 property right at issue is tangible or intangible, has been met by each of the Hobbs Act counts at
13 issue here. We also reject the numerous other challenges brought by the defendants-appellants to
14 their convictions. Finally, with regard to the defendants-appellants’ sentences, we remand
15 Ciccone’s and Bondi’s cases for resentencing pursuant to *United States v. Fagans*, 406 F.3d 138
16 (2d Cir. 2005), and we remand Peter Gotti’s case for consideration of resentencing pursuant to

¹This decision is frequently abbreviated as “*Scheidler II*,” because it represented the case’s second journey up to the Supreme Court. The case’s first visit to the Supreme Court – *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) – is generally referred to as “*Scheidler I*.” A recent ruling by the Supreme Court on yet another issue in the case, *Scheidler v. Nat’l Org. for Women, Inc.*, 126 S. Ct. 1264 (Feb. 28, 2006), is known as “*Scheidler III*.” For purposes of clarity, we employ these abbreviations in this opinion.

1 *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).² We also reject the argument advanced in
2 the government’s cross-appeal that the district court erred when, in sentencing Peter Gotti under
3 the then-mandatory Sentencing Guidelines, it declined to impose a four-level leadership role
4 enhancement upon him despite its finding that he had served as acting boss of the Gambino
5 Organized Crime Family of La Cosa Nostra (the “Gambino Family”).

6 **I. BACKGROUND: THE INDICTMENT, TRIAL, VERDICTS, AND SENTENCES**

7 **A. The Indictment**

8 The 68-count indictment in this case centered on the corrupt influence of the Gambino
9 Family over certain labor unions, businesses, and individuals operating at the piers in Brooklyn
10 and Staten Island. The indictment was brought against seventeen Gambino Family members and
11 associates, including the four defendants-appellants here: (1) Peter Gotti, described in the
12 indictment as the acting boss of the Gambino Family; (2) Ciccone, described as a Gambino
13 Family captain; (3) Richard G. Gotti, described as a “made member” of the Gambino Family; and
14 (4) Bondi, described as a Gambino Family associate.³ The four defendants-appellants all went to
15 trial, along with three other defendants (Primo Cassarino, Richard V. Gotti, and Jerome

²Richard G. Gotti’s appeal was previously severed from this appeal, and his case was remanded to the district court for consideration of resentencing pursuant to *Crosby*. The district court declined to resentence, and Richard G. Gotti then moved to reconsolidate his appeal with the instant appeal so that he could join in the arguments of the other defendants-appellants to the extent that they benefitted him. Accordingly, we assume that Richard G. Gotti joins in those of the defendants-appellants’ challenges to their convictions that are applicable to his own convictions. Given that we ultimately reject all of those challenges for the reasons set forth *infra*, and that the district court has already considered whether to resentence him pursuant to *Crosby*, there is no need for a further remand of Richard G. Gotti’s case.

³For a brief discussion of the meaning of those terms, *see infra* page [19].

1 Brancato, all of whom were described as “made members” of the Gambino Family), while the
2 remaining ten defendants entered guilty pleas.⁴

3 The first two counts of the indictment were racketeering and racketeering conspiracy
4 counts brought under 18 U.S.C. §§ 1962(c) and (d). These two counts encompassed, as predicate
5 acts, the substantive allegations that were then also set forth as separate offenses in Counts 3-68.

6 For purposes of this appeal, the counts of which the defendants-appellants were
7 ultimately convicted can be divided, on the basis of general subject matter, into fourteen
8 categories. Those categories are as follows: (1) the International Longshoremen’s Association,
9 AFL-CIO (“ILA”) Counts (RICO Predicate Act 1; Counts 3-7); (2) the Management-
10 International Longshoremen’s Association Managed Health Care Trust Fund (“MILA”) Counts
11 (RICO Predicate Act 2; Counts 8-13); (3) the Local 1 Checkers chapter of the ILA (“Local 1”)
12 Counts (RICO Predicate Act 3; Counts 14-18); (4) the Local 1814 chapter of the ILA (“Local
13 1814”) Counts (RICO Predicate Act 4; Counts 19-23); (5) the Howland Hook Container
14 Terminal (“Howland Hook”) Counts (RICO Predicate Act 5; Counts 24-25); (6) the Frank
15 Molfetta (“Molfetta”) Counts (RICO Predicate Act 6; Counts 26-27); (7) the Money Laundering
16 Counts (RICO Predicate Acts 7-21; Counts 28-46); (8) the Tommy Ragucci (“Ragucci”) Counts
17 (RICO Predicate Act 23; Counts 49-50); (9) the Leonardo Zinna (“Zinna”) Count (RICO
18 Predicate Act 24; Count 51); (10) the Nicola Marinelli (“Marinelli”) Counts (RICO Predicate Act
19 25; Counts 52-53); (11) the Eduard Alayev (“Alayev”) Counts (RICO Predicate Act 26; Counts

⁴Those ten defendants, certain of whom figure in the factual recitation below, were Peter Piacenti, Anna Eyllenkrig, Thomas Lisi, Carmine Malara, Jerome Orsino, Jr., Frank Scollo, Vincent Nasso, Anthony Pansini, Julius R. (“Jules”) Nasso, and Salvatore Cannata.

54-57); (12) the Steven Seagal (“Seagal”) Counts (RICO Predicate Act 27; Counts 58-59); (13) the Gambling Counts (RICO Predicate Acts 31-32; Counts 66-67) and (14) the Witness Tampering Count (RICO Predicate Act 33; Count 68).

B. The Trial

Below, we summarize – in the light most favorable to the government, given the defendants-appellants’ convictions – the evidence adduced at trial as to each category of counts with respect to the applicable defendants-appellants.

1. The ILA Counts

The gravamen of the ILA Counts, Indictment ¶¶ 98-109, was that certain members and associates of the Gambino Family, including defendant-appellant Ciccone, had exercised control over the affairs of the union, first by using force to determine “who filled various International Executive Officer and other ILA positions” in order to “ensure that organized crime associates would be placed in these positions,” and then by directing the activities of those office-holders. *Id.* ¶ 100. These activities gave rise to counts of both extortion and fraud.

With regard to extortion, the indictment alleged that the defendants had wrongfully obtained the following property of ILA union members: “(1) ILA labor union positions, money paid as wages and employee benefits, and other economic benefits that such ILA union members would have obtained but for the defendants’ corrupt influence over such union; (2) the right of ILA union members to free speech and democratic participation in the affairs of their labor organization as guaranteed by [Sections 411 and 481 of the Labor-Management Reporting Disclosure Act (“LMRDA”), 29 U.S.C. § 401 *et seq.*]; and (3) the right of ILA union members to

1 have the officers, agents, delegates, employees and other representatives of their labor
2 organization manage the money, property and financial affairs of the organization in accordance
3 with [Section 501(a) of the LMRDA].” *Id.* ¶ 99.

4 As to fraud, the indictment stated that the defendants had defrauded the ILA and its
5 members out of (1) “ILA labor union positions, money paid as wages and employee benefits, and
6 other economic benefits that such ILA union members would have obtained but for the
7 defendants’ corrupt influence over such union” and (2) their right to the honest services of their
8 elected officials and other ILA delegates, employees, agents, and representatives. *Id.* ¶ 104.

9 At trial, the government adduced substantial evidence in support of the ILA charges.
10 George Barone – a member of the Genovese Organized Crime Family of La Cosa Nostra (the
11 “Genovese Family”) – testified that there had been a long-held understanding between the
12 Gambino Family and the Genovese Family concerning the ILA’s activities, whereby the
13 Gambino Family “would take care of Staten Island and Brooklyn” and the Genovese Family
14 “would take care of New York and New Jersey.” Trial Tr. (“Tr.”) 721-22, 727. Barone stated
15 that in the late 1970s, Ciccone became the Gambino representative in charge of the waterfront for
16 Staten Island and Brooklyn, and served as a vice president of the ILA, with the local ILA union
17 officials essentially under his control. Tr. 735-37. Barone himself went to jail from 1983 to
18 1990, and after being released from jail, again became involved in the Genovese Family’s
19 waterfront activities. Tr. 739, 743. At that point, Barone learned that Ciccone was still
20 controlling the waterfront activities in the area, and still possessed influence over the ILA local
21 union officials’ activities. Tr. 755.

1 Additionally, Frank Scollo – former president of Local 1814, an ILA chapter in
2 Brooklyn – testified that “Mr. Ciccone would tell me on many occasions what to do, what not to
3 do.” Tr. 1337, 1341-42. Scollo explained that he feared losing his job as president if he
4 contradicted Ciccone’s orders. Tr. 1371. He stated his predecessor, Frank Lonardo, had
5 similarly taken instructions from Ciccone. Tr. 1362-63. Scollo further testified that he kept his
6 relationship with Ciccone secret from all of the other union members. Tr. 1411.

7 Scollo also specifically testified that prior to the July 2000 ILA convention in Lake Tahoe
8 (which Scollo was to attend as a delegate), Ciccone gave him instructions as to which individuals
9 should be elected to various ILA leadership positions. Tr. 1396. Scollo stated that he was only
10 partially able to carry out these instructions, and that he immediately conveyed all of the
11 developments to Ciccone because “Sonny wanted to know whatever we did; he wanted to be
12 firsthand; he wanted to know about it.” Tr. 1398-1400. Scollo explained that Ciccone “didn’t
13 want to lose any positions from the Brooklyn side, and as a result, we lost one spot that was [a]
14 concern of his and ours.” Tr. 1401. The government also introduced wiretap evidence of the
15 reports that Scollo made to Ciccone (through Cassarino as an intermediary). Gov’t Exh. TR-63.

16 Moreover, Scollo testified that after the ILA convention, a particular Local 1814 delegate
17 named Phil Scala was upset that he had not obtained the leadership position that he wanted, and
18 thus essentially refused to do any more work. Tr. 1448. Scollo, as a result, was very unhappy
19 with Scala’s performance and wanted to terminate him. Tr. 1449. However, Scollo did not feel
20 that he had the authority to terminate Scala without Ciccone’s approval, because “Sonny always
21 told us . . . it’s the big decisions that we should have to confer with him first.” Tr. 1450. In a

1 wiretapped April 18, 2001 conversation between Scollo and Ciccone, Scollo asked, “Can I fire
2 him if I have to?” Gov’t Exh. TR-87. Ciccone responded, “Know what you do . . . don’t pay
3 him for vacation, and tell him, ‘Let me tell you something, I was told to tell you already that next
4 time you fuck up like this and you leave me hanging like this, I’m gonna fire you’. . . . And let
5 him go where the fuck he wants to go.” *Id.* Scollo followed these instructions and Scala later
6 resigned. Tr. 1455. Scollo then sought Ciccone’s approval to appoint someone else in his place.
7 Tr. 1456.

8 **2. The MILA Counts**

9 The MILA Counts related to a scheme of the Gambino and Genovese Families to use
10 their control over MILA (the ILA’s national health plan) to ensure that a particular company
11 called GPP/VIP – which was partially owned by Gambino Family associate Vincent Nasso, and
12 which paid substantial kickbacks – was awarded MILA’s lucrative pharmaceutical services
13 contract. Indictment ¶¶ 110-113. Ciccone was the only defendant-appellant named in these
14 counts.

15 At trial, the government adduced evidence of the MILA scheme from several sources.
16 David Tolan – the management co-chairman of MILA since 1997 – testified that MILA had been
17 established in early 1997 as a national health plan for all ILA members, and that its Board of
18 Trustees included eighteen management-side trustees and eighteen union-side trustees. Tr. 1079,
19 1082. In 1997, the MILA trustees decided to include a prescription drug benefit for the members
20 and, to that end, requested proposals from twenty-two pharmaceutical benefit providers. Tr.
21 1088. All twenty-two companies responded with bids; MILA’s outside consultants then

1 produced a list of the top five contenders. Tr. 1088-89. A company called GPP ranked number
2 five in that list, while a company called Express Scripts ranked first. Tr. 1089. Nolan
3 recommended that GPP (which he believed lacked sufficient financial resources) be eliminated
4 from the list, and that MILA engage Express Scripts. Tr. 1092. The union trustees, however, did
5 not agree with that recommendation, and wanted to enter into an arrangement with GPP. Tr.
6 1093, 1097-98. The trustees eventually reached an agreement whereby everything below the
7 Virginia border would be managed by Express Scripts, and everything above the Virginia border
8 would be managed by GPP, which had since become part of a larger entity called GPP/VIP. Tr.
9 1099-1101. The principals of GPP/VIP were Joel Grodman and co-defendant Vincent Nasso.
10 Tr. 1101.

11 Tolan further testified that after Express Scripts refused to allow an audit that the MILA
12 trustees wanted, MILA began using GPP/VIP exclusively, both north and south of the Virginia
13 border. Tr. 1104-05. Tolan stated that he did not consider GPP/VIP cost-effective, because it
14 was more expensive than other service providers. Tr. 1108. In June of 2001, GPP/VIP requested
15 a half-million dollar annual fee increase, at which point Tolan decided to have the MILA
16 consultants initiate a new round of bidding for the contract. Tr. 1110-13. After the bids came in,
17 GPP/VIP came in second place; in first place was Advance PCS, a pharmaceutical benefit
18 provider whose bid was \$4.5 million cheaper than that submitted by GPP/VPP. Tr. 1113-14.
19 Although all the trustees then initially agreed to award the contract to Advance PCS, the union
20 trustees subsequently changed their position and sought to impose two conditions on Advance
21 PCS. Tr. 1114, 1120. Advance PCS agreed to the conditions, but the union trustees still refused

1 to support it, and brought a motion to continue using GPP/VIP. Tr. 1123-25. At that point, the
2 management trustees submitted the matter to binding arbitration, and the arbitrator ultimately
3 ruled in favor of Advance PCS. Tr. 1126-27. Thus, GPP/VIP ultimately held the lucrative
4 pharmaceutical services contract from approximately 1997 to 2001.

5 The government also adduced evidence that helped to explain why certain ILA trustees
6 had been such strong supporters of GPP/VIP, notwithstanding its higher rates: Ciccone had so
7 ordered. Barone testified that Vincent Nasso was a Gambino Family associate who paid
8 kickbacks to Ciccone out of the contract proceeds. Tr. 760-61. Moreover, Scollo – who, after
9 becoming the President of Local 1814 in August of 2000, became a union-side MILA trustee –
10 specifically testified that he was informed that “Sonny [Ciccone] was interested in [Vincent]
11 Nasso, keeping the GPP in place.” Tr. 1412-13. He stated that “Sonny himself told me to keep
12 him abreast of it.” Tr. 1413. Scollo further testified that when Advance PCS emerged as a
13 strong challenger in 2001, Cassarino instructed Ciccone, “make sure you do all you can to help
14 [GPP].” Tr. 1419. Scollo responded, “I’ll do the best I can, but I think it’s too far gone.” Tr.
15 1419-20. Scollo testified that he did not reveal Ciccone’s connection with Nasso to any of the
16 other MILA trustees or members. Tr. 1431.

17 The government also presented wiretap evidence indicating the connection between
18 Nasso and Ciccone, as well as the kickbacks that were being paid from Nasso to Ciccone. For
19 example, in a March 26, 2001 wiretapped conversation among Ciccone, Cassarino, and Nasso,
20 the three men discussed the fact that the MILA March payment had just come in. Gov’t Exh.
21 TR-176. Ciccone asked Nasso, “When am I going to see you? I gotta, I’m gonna lay it out.” *Id.*

1 (As discussed in further detail *infra*, this was apparently a reference to Ciccone’s need for the
2 money in order to make his monthly tribute payment to Peter Gotti, the acting boss.) On
3 Wednesday, April 18, 2001, Ciccone and Nasso spoke again about the MILA contract. Nasso
4 noted that “the Jew [Joel Grodman, co-principal of GPP/VIP] wants to raise the rate.” Gov’t
5 Exh. TR-178N. Ciccone responded, “Tell him to go fuck himself. Tell him you do what I tell
6 you to do.” *Id.* Ciccone added, “I’m calling the shots over here, not you. And tell him, the day
7 you don’t like it, I got another guy to replace you. You’re only here on account of me. Fuck
8 him.” *Id.* Nasso agreed, stating, “All right. That’s what I’m gonna say today.” *Id.* Ciccone also
9 asked about receiving his check, to which Nasso responded, “The Jew’s gotta send me the
10 money.” *Id.* Ciccone asked, “But the Jew got the money?” *Id.* Nasso replied, “No, not yet, not
11 yet. . . . I gotta know when it comes in.” *Id.* Ciccone said, “So tell me about it, I’m laying the
12 fucking thing out too . . . [the] last two months, last two times.” *Id.*

13 **3. The Local 1 Counts**

14 The gravamen of the Local 1 Counts, Indictment ¶¶ 124-137, was that certain defendants,
15 including defendants-appellants Ciccone and Bondi, had conspired and attempted to extort and
16 defraud the Local 1 Chapter of the ILA, particularly by trying to exercise control over two Local
17 1 officials: Steve Knott (the president) and Louis Saccenti (an elected Local 1 delegate).
18 Specifically, the indictment alleged that the defendants had sought to extort the Local 1
19 members’ property interests in “(1) Local 1 labor union positions, money paid as wages and
20 employee benefits, and other economic benefits that such Local 1 union members would have
21 obtained but for the defendants’ corrupt influence over such union; (2) the right of Local 1 union

1 members to free speech and democratic participation in the affairs of their labor organization as
2 guaranteed by [Sections 411 and 481 of the LMRDA, 29 U.S.C. § 401 *et seq.*]; and (3) the right
3 of Local 1 union members to have the officers, agents, delegates, employees and other
4 representatives of their labor organization manage the money, property and financial affairs of
5 the organization in accordance with [Section 501(a) of the LMRDA].” *Id.* ¶ 125. The indictment
6 further alleged that the defendants had sought to defraud Local 1 and its members out of (1)
7 “Local 1 labor union positions, money paid as wages and employee benefits, and other economic
8 benefits that such Local 1 union members would have obtained but for the defendants’ scheme
9 and artifice to defraud” and (2) their right to the honest services of their elected officials and
10 other Local 1 delegates, employees, agents, and representatives. *Id.* ¶ 130.

11 At trial, Scollo testified that while he was President of Local 1814, he had several
12 conflicts with Saccenti, because Saccenti – on behalf of Local 1 – would sometimes take actions
13 that “were detrimental to the Brooklyn side of the waterfront, my local [Local 1814].” Tr. 1432.
14 When this occurred, Scollo would “call up Primo [Cassarino] and say ‘that guy’s breaking chops
15 again,’ and he would bring it to Sonny [Ciccone].” *Id.* For example, on one occasion during the
16 summer of 2000, Scollo was upset that Saccenti was going to fill a temporarily vacant shop
17 steward position with someone named Doyle. Tr. 1433. Scollo explained that he wanted
18 someone else to fill that position. *Id.* Accordingly, he reported the situation to Cassarino, hoping
19 that Cassarino would tell Ciccone and that Ciccone would “reach out for Louie [Saccenti] not to
20 make that change.” Tr. 1433-44. Cassarino, in turn, told Scollo to tell “Stevie” [Knott] “not to
21 make any move until [Ciccone] speaks to [Saccenti].” Tr. 1441. Scollo, however, was unable to

1 reach Knott. *Id.*

2 Scollo testified that the friction between him and Saccenti continued, as Saccenti
3 attempted to make certain changes at the Howland Hook Container Terminal in Staten Island.
4 Tr. 1444-45. Scollo did not like these changes because he believed they would “slow things
5 down” on the Local 1814 side. Tr. 1445. Thus, in a February 26, 2001 wiretapped conversation
6 between Scollo and Cassarino, Scollo said that he had told “Augie [Decrescenzo, the Local 1
7 stop steward] no changes till we get notified. That’s Sonny’s [Cicccone’s] orders.” Gov. Exh.
8 TR-77. In a March 8, 2001 conversation between Scollo and Cassarino, Scollo reported, “Augie
9 called me [H]e was all disturbed from Howland Hook Louie [Saccenti] told Augie this
10 afternoon that he spoke to you and everything was taken care of.” Gov’t Exh. TR-78. Scollo
11 stated that Saccenti was a “liar” for having falsely implied that everything was resolved. *Id.*
12 Cassarino instructed, “[T]ell Louie, ‘Lou, what are you doin’, you’re supposed to see me before
13 you do anything.’” *Id.*

14 The tension between Scollo and Saccenti continued to worsen, as evidenced by a June 27,
15 2001 wiretapped conversation between Scollo and Cassarino, in which Scollo reported that
16 Saccenti was telling everyone “all bets are off.” Gov’t Exh. TR-79. Cassarino responded, “I
17 don’t understand this guy. . . . Who the fuck is givin’ this guy authority to do this?” *Id.* Scollo
18 agreed: “Something’s gotta be done with Louie.” *Id.* Cassarino reiterated, “He’s outta control. . .
19 . Who the fuck’s he think he is?” *Id.* Later that day, in another wiretapped conversation,
20 Cicccone instructed Cassarino to take “Richie” [Bondi] with him that night and to “[s]top by”
21 Saccenti’s house, “ring his bell,” and “[s]ay, you know what? You’d better stop it. . . . You’d

1 better stop. . . . Otherwise, you know what's gonna happen here?" Gov't Exh. TR-81. At trial,
2 an investigator for the New York State Attorney General's organized crime task force testified
3 that on that evening, he saw Cassarino and Bondi drive up to Saccenti's home, exit their car,
4 walk toward the entrance, wait there, and then drive away. Tr. 3230-3235.⁵

5 At trial, Scollo acknowledged that as a Local 1814 official, he did not have any authority
6 over these Local 1 officials, but testified that he – through the help he received from Cassarino
7 and Ciccone – was nonetheless sometimes successful in influencing Saccenti's activities with
8 respect to Local 1. Tr. 1447-48.

9 **4. The Local 1814 Counts**

10 These counts alleged that certain defendants, including Ciccone, had – principally
11 through their control over Scollo, the Local 1814 President – conspired and schemed to defraud
12 members of Local 1814 out of (1) "Local 1814 labor union positions, money paid as wages and
13 employee benefits, and other economic benefits that such Local 1814 union members would have
14 obtained but for the defendants' scheme and artifice to defraud" and (2) their right to the honest
15 services of their elected officials and other Local 1814 delegates, employees, agents, and
16 representatives. Indictment ¶¶ 138-151. The government adduced significant evidence in
17 support of these charges, as described above: namely, the testimony and wiretaps illustrating in
18 detail that Scollo, unbeknownst to the Local 1814 members whom he purportedly represented,
19 had taken orders from Ciccone as to Local 1814 activities, and had not made significant Local

⁵In the transcript, the date is transcribed as January 27, 2001, rather than June 27, 2001. Tr. 3231. We assume that this is a transcription error.

1 1814 decisions without first obtaining Ciccone's approval.

2 **5. The Howland Hook Counts**

3 The gravamen of these counts was that certain defendants, including defendant-appellant
4 Ciccone, had extorted cash payments from Carmine Ragucci, the then-owner of Howland Hook
5 Container Terminal, a shipping terminal in Staten Island. *Id.* ¶¶ 152-155.

6 At trial, Scollo testified that in late 1996 (before he became president of Local 1814),
7 Ciccone told him that Ragucci was going to start giving him envelopes for transmission back to
8 Ciccone. Tr. 1379. Scollo said that he did "not really" want to be involved in bringing the
9 envelopes from Ragucci to Ciccone. *Id.* Nonetheless, about eight or nine months later, Ragucci
10 began periodically giving Scollo envelopes for Ciccone. Tr. 1380-81. Scollo testified that he
11 would give the envelopes either directly to Ciccone, or (at Ciccone's instructions) to someone
12 else who would then pass the envelope on to Ciccone. Tr. 1381-82. Scollo once assisted
13 Ragucci in putting approximately \$8,900 in cash in an envelope for transmission to Ciccone. Tr.
14 1383.

15 Scollo testified that he was supposed to pick up the envelopes from Ragucci quarterly, but
16 that Ragucci was very often late with the payments. Tr. 1384. When Ragucci was late, Scollo
17 would report to Ciccone that Ragucci did not have the money, at which point Ciccone would tell
18 him to "make sure that guy does the right thing," and "make sure you go back and make sure you
19 get it." Tr. 1384, 1392. Scollo testified that Ciccone would be "a little pissed off" by late
20 payments and that he, in turn, would communicate Ciccone's displeasure to Ragucci. Tr. 1392.

21 Scollo further stated that he believed that the transmissions were illegal, explaining, "The

1 fact that we were doing it in these crazy places, and it got worse as time went by, I knew it was
2 not the proper thing to do. I just did it.” Tr. 1386. He also testified about the surreptitious
3 nature of the transmissions: “We tried to use decoded ways. . . . By that I mean, we would use
4 various code words – you got ‘that thing’?” Tr. 1388. He explained that they wanted to ensure
5 that if someone were listening to the conversation, its meaning would not be easily understood.
6 Tr. 1389.

7 Additionally, both Scollo and Carmine Ragucci’s brother, Tommy, indicated that Ciccone
8 had no legitimate reason to collect payments from Ragucci, by testifying that to their knowledge,
9 Ciccone had not loaned Ragucci money, nor was he an investor in Howland Hook. Tr. 1744-45,
10 1897.

11 6. The Molfetta Counts

12 These counts alleged that certain defendants, including defendant-appellant Ciccone, had
13 extorted Frank Molfetta, the owner of a trucking company. Indictment ¶¶ 156-59. The events
14 leading up to this extortion began in 1994, when Molfetta – the owner of a trucking company
15 named Bridgeside Drayadge – entered into a written contract with Carmine Ragucci, pursuant to
16 which he paid Ragucci \$150,000 for certain exclusive rights to operate the trucking business at
17 Howland Hook. Tr. 1785. Molfetta was supposed to pay Ragucci an additional \$100,000 once
18 he had earned back the initial \$150,000. *Id.* In approximately 1996, however, Ragucci breached
19 the contract by giving some of the Howland Hook trucking work to another company. Tr. 1789.
20 Molfetta, who had not yet even earned back the initial \$150,000, concluded that he did not owe
21 Ragucci the additional \$100,000, although he still continued providing trucking services at

1 Howland Hook. Tr. 1789-92.

2 Approximately three years later – in late 1999 or early 2000 – Ragucci told Molfetta that
3 Ciccone wanted to see him. Tr. 1792. At a meeting at the Unicorn Diner on Staten Island,
4 Ciccone told Molfetta not to pay Ragucci any more money, and to start paying him instead. Tr.
5 1794-97. Molfetta testified that Ciccone asked for \$2500 per month, but that he told Ciccone
6 that he could only pay \$1500, and that he would start making these payments the following
7 month. Tr. 1802. Ciccone responded, “No, you start for last month.” Tr. 1803.

8 Molfetta therefore started making monthly cash payments to Ciccone. When asked at the
9 grand jury proceeding why he made these payments, Molfetta stated, “Why? Fear,” adding, “I’m
10 afraid right now. . . . [Y]ou kind of know people in that position have the power to do things to
11 people if they don’t do what they’re told to do.”

12 At the trial, however, Molfetta changed his account and stated that he had paid Ciccone
13 not out of fear, but rather because Ciccone got him out of his contract with Ragucci. Tr. 1807.
14 The government therefore introduced Molfetta’s grand jury testimony as a prior inconsistent
15 statement that could be admitted for its truth. Tr. 1808. When confronted with that earlier
16 inconsistent testimony, Molfetta testified that he had simply told the government what it wanted
17 to hear during the grand jury proceedings, because he was scared that he would be put in jail. Tr.
18 1809-1811. He acknowledged, however, that the government had threatened him with jail only
19 if he gave false testimony. Tr. 1814.⁶

⁶Molfetta subsequently was charged with perjury for his trial testimony, pled guilty, and was sentenced to six months’ imprisonment.

1 **7. The Money Laundering Counts**

2 These counts related to the payment of illicit proceeds by lower-ranking members to the
3 highest-ranking members of the Gambino Family as “tributes.” Peter Gotti, Ciccone, and
4 Richard G. Gotti were the defendants-appellants named in these counts. Indictment ¶¶ 162-63.

5 At trial, the government presented evidence about the general structure of organized
6 crime families such as the Gambino Family, and about the practice of making tribute payments.
7 FBI Agent Gregory Hagarty testified as an expert witness on organized crime, and explained that
8 in the typical organized crime family in New York City, the “boss” is at the top of the hierarchy,
9 with the “underboss” and the “consigliere” right below him, collectively making up the
10 “administration.” Tr. 232, 236. Agent Hagarty stated that when the boss is imprisoned or
11 otherwise incapacitated, the family has “an acting boss who speaks with the same authority as the
12 boss.” Tr. 240. He explained that below the administration, there are typically a “number of
13 captains,” each of whom runs “a crew of soldiers.” Tr. 236. He stated that “associates” were
14 ranked below soldiers, sitting at the lowest level of the pyramid. *Id.* Agent Hagarty further
15 explained that the overall purpose of an organized crime family is to generate money from illegal
16 activities for the “administration.” Tr. 238. He referred to this practice as “kicking up,”
17 explaining that “[y]ou take money from your illegal activities and kick it up to your boss.
18 ‘Tribute’ is another word they use.” Tr. 239.

19 With regard to the Gambino Family, Agent Hagarty testified that Paul Castellano had
20 served as boss of the family until 1985, at which point John J. Gotti became its boss. Tr. 248.
21 Agent Hagarty further stated that John J. Gotti’s son, John A. Gotti (also known as “Junior”),

1 took over as acting boss in 1992 and served in that position until 1999. Tr. 446-48. The
2 government further presented evidence that in 1999 (when John A. Gotti was imprisoned), his
3 uncle Peter Gotti – brother of John J. Gotti – became acting boss of the Gambino Family.
4 Specifically, the government introduced wiretaps of conversations between Gene Gotti (the
5 incarcerated brother of John J. Gotti and Peter Gotti) and various visitors to the FCI McKean
6 prison. In one such conversation on May 13, 1999, Gene Gotti stated, “My brother Pete’s
7 making the books.” Gov’t Exh. HTR-5. Agent Hagarty testified that this was a reference to
8 “making new members,” which could be done only by someone in the administration. Tr. 2442.
9 In another such conversation, which occurred on January 13, 2000, Gene Gotti stated that Peter
10 Gotti was “just there because there’s nobody else to put there.” Gov’t Exh. HTR-10

11 In the wiretapped conversations, Gene also referred to tribute payments that were being
12 made to Peter Gotti. For example, when one visitor commented to Gene on November 18, 1999,
13 “Two thousand. A thousand each youse are getting . . . every month,” Gene responded, “Where
14 am I getting it? My wife ain’t getting it Who’s taking it now?” Gov’t Exh. HTR-6. The
15 visitor replied, “Your brother gets it. Your brother has it.” *Id.* Subsequently, Gene commented,
16 “They’re all taking money. My brother Pete and all the rest of them.” Gov’t Exh. HTR-7. The
17 visitor stated, “Gene, you’ve been getting it for the last three years.” *Id.* Gene said, “I never seen
18 it the last three years [I]f you did give it to somebody, please get it back. For three years,
19 that’s a hundred and fifty thousand dollars. No, twelve, twenty-four, it’s thirty-six thousand.
20 Please get it and send it right to my house.” *Id.* The visitor responded, “I’ll tell your brother.”
21 *Id.* Gene said, “And from now on don’t give it to my brother I don’t want that. The

1 situation is he gets it – but I haven’t touched it. He was my acting capo.” *Id.* Two months later,
2 Gene instructed another visitor, “As soon as you see Peter just tell him, here. Here’s eight for
3 you, here’s four for Genie.” Gov’t Exh. HTR-10.

4 Moreover, the government presented evidence indicating that the tributes were paid in
5 cash to Peter Gotti on a monthly basis – typically the third or fourth Tuesday of each month, and
6 transmitted from Jerome Brancato to Peter Gotti – and that these payments came from extortion,
7 fraud, and gambling activities. For example, on the third Tuesday of April 2000 (April 18,
8 2000) Ciccone, Cassarino, and Brancato discussed arrangements for payments to someone they
9 referred to only as “him.” Gov’t Exh. TR-154. Brancato stated, “I was out there the other day
10 with him, I went over the whole thing with him. I’ll bring it to him.” *Id.* Cassarino responded,
11 “Do it the way he told ya [J]ust take what ya gotta take . . . and give [him] everything else.”
12 *Id.* Similarly, on May 22, 2000 (which was the day before the fourth Tuesday of May 2000, *i.e.*,
13 May 23, 2000), Ciccone told Cassarino, “[t]hat guy tomorrow [T]ell that guy, if he, he, he’s
14 a little confused and he needs to see me, I’ll see him anytime he wants.” Gov’t Exh. TR-156.
15 “What guy?” Cassarino asked. *Id.* “You know what I’m talkin’ about, the guy that Jerry
16 [Brancato’s] gotta see tomorrow,” answered Ciccone. *Id.* Cassarino then said, “Oh, oh, oh, oh,
17 yeah, okay. Alright.” *Id.*

18 Similarly, on October 15, 2000 – which was two days before the third Tuesday of October
19 2000 (October 17, 2000) – Cassarino told Bondi to go see “Eddie” [Alayev] and to “[d]o
20 everything,” stating, “I gotta make that deadline by tomorrow, and I’m not gonna make it.”
21 Gov’t Exh. TR-162. At trial, Agent Hagarty testified that on October 17, 2000, Brancato met

1 Peter Gotti near 159th Avenue and 96th Street in Howard Beach. Tr. 2356.

2 Once again, on November 25, 2000 – which was three days before the fourth Tuesday in
3 November (November 28, 2000) – Cassarino told Bondi, “[Y]ou’re gonna have to get the whole
4 thing from Jerome [Orsino] anyway and drop it off at Jerry [Brancato’s] house.” Gov Exh. TR-
5 165. On the payment date – November 28, 2000 – Bondi told Cassarino that Brancato was
6 waiting for him at the club, “because he had to go over there today . . . you know what I’m
7 saying?” Gov’t Exh. TR-166. At trial, Agent Hagarty testified that on that same day, Brancato
8 was seen going out to Howard Beach, and subsequently meeting Peter Gotti near 159th Avenue
9 and 96th Street there. Tr. 2357-59.

10 Surveillance agents also observed Brancato meeting Peter Gotti in the same area on
11 January 23, 2001 (the fourth Tuesday of the month). Special Agent James I. Folsom III of the
12 FBI testified that he was on a surveillance assignment in Howard Beach that day. Tr. 2095-96.
13 He stated that he observed Peter Gotti’s vehicle come into the area, and that this vehicle then
14 “circled the block several times – different blocks.” Tr. 2097-98. He testified that Brancato then
15 arrived, carrying a “white plastic shopping bag.” Tr. 2098. Brancato then got into Peter Gotti’s
16 vehicle, which drove away. Tr. 2097. Agent Hagarty similarly testified that Brancato was seen
17 meeting Peter Gotti at the same Howard Beach location on February 27, 2000 (the fourth
18 Tuesday of the month). Tr. 2361.

19 Wiretapped conversations from March and April 2001 indicated that the monthly tribute
20 payments were also being derived, at least in part, from the MILA kickbacks. For example, on
21 March 26, 2001, which was the day before the last Tuesday in March, Cassarino told Ciccone

1 that Brancato was “gonna see him [Peter Gotti] Wednesday, not tomorrow.” Gov’t Exh. TR-176
2 Ciccone responded that Brancato was “comin’ up short . . . so I’ll lay out the [W]hat[,] I’m
3 gonna send Jerry [Brancato] there with nothin’[?]” *Id.* Later in the conversation, Nasso – who
4 was also on the phone – stated that the MILA March payment had just come in that day. Ciccone
5 asked, “When am I going to see you? I gotta, I’m gonna lay it out,” *i.e.*, provide Brancato with
6 money for the tribute payment to Peter Gotti. *Id.* At trial, Agent Hagarty testified that on
7 Wednesday, March 28, 2001, he observed Brancato meeting with Peter Gotti at the same Howard
8 Beach location. Tr. 2365.

9 On Wednesday, April 18, 2001, Ciccone and Nasso spoke again about the money from
10 the MILA contract. In this conversation, Nasso stated that “the Jew [Joel Grodman] gotta send
11 me the money I gotta know when it comes in.” Ciccone said, “So tell me about it, I’m
12 laying the fucking thing out too . . . [the] last two months, last two times.” Gov’t Exh. TR-178N.
13 At trial, Special Agent Robert Rogers of the FBI stated that on Tuesday, April 24, 2001, he
14 observed Brancato meeting Peter Gotti in the same vicinity in Howard Beach. Tr. 2168.

15 On April 25, 2001, Brancato was arrested in another case, after which time the payment
16 mechanism changed. Tr. 2411. Whereas previously Brancato had been making the payments
17 directly to Peter Gotti in Howard Beach, now Cassarino began making the payments either to
18 Richard V. Gotti (Peter Gotti’s brother) or defendant-appellant Richard G. Gotti (Richard V.
19 Gotti’s son and Peter Gotti’s nephew) in Brooklyn. On Monday, June 25, 2001, for example,
20 Cassarino noted to Ciccone, “We gotta, got that appointment Thursday . . . for the month.” Gov’t
21 Exh. TR-182. At the trial, Special Agent Rogers testified that on Thursday, June 28, 2001, he

1 followed Cassarino – who was carrying a blue plastic bag – to the Sheepshead Bay neighborhood
2 of Brooklyn, where Cassarino then entered Maria’s Restaurant. Tr. 2200-01. Richard G. Gotti’s
3 car was seen in the parking lot of the restaurant. Tr. 2202-03.

4 On Wednesday, September 26, 2001, Cassarino indicated to Ciccone that he had initially
5 thought he had “that number,” *i.e.*, the full tribute payment, but that “I don’t have it.” Gov’t Exh.
6 TR-189. The following day, Ciccone indicated that he would advance Cassarino the money:
7 “[H]ere’s what I’m gonna . . . I’m gonna give you [money] that’s from this guy. Gonna go see
8 him tomorrow, alright. So this way, if I have to lay it out [in advance], I’m gonna see him
9 tomorrow morning.” Gov’t Exh. TR-189A. The “him” to whom Ciccone was referring was
10 apparently Frank Molfetta – who, as described above, was being extorted for monthly payments
11 by Ciccone – given that the following morning (September 28, 2001), Captain James McGowan
12 of the Waterfront Commission of New York Harbor observed a meeting between Ciccone and
13 Molfetta at a diner on Staten Island, during which Molfetta passed an envelope across the table to
14 Ciccone, stating “it’s all there, hundreds.” Tr. 1863, 1870.

15 On November 29, 2001, law enforcement officers executed search warrants on Cassarino
16 and Richard G. Gotti after observing a meeting between them at Maria’s Restaurant in Brooklyn.
17 They recovered \$12,000 in cash from Richard G. Gotti’s pants pockets. Tr. 2315-2316.
18 Cassarino later reported to Ciccone that “[r]emember what happened to Jerry [Brancato] last time
19 [*i.e.*, being apprehended by law enforcement]? . . . Just happened to me.” Gov’t Exh. TR-202.
20 Ciccone noted, “we should change it,” an apparent reference to the existing tribute payment
21 mechanism. *Id.* Cassarino agreed: “Definitely, without a doubt.” *Id.* Ciccone reiterated, “Yeah.

1 Fuck that. I don't wanna go to jail." *Id.* Cassarino reflected, "They [the officers] gave me his
2 card, that fucking [Captain] McGowan, that prick." *Id.*

3 **8. The Tommy Ragucci Counts**

4 These counts alleged that certain defendants, including defendant-appellant Ciccone, had
5 conspired and unsuccessfully attempted to extort Tommy Ragucci (referred to in the indictment
6 as "John Doe 1"), an employee at Howland Hook (and the brother of Carmine Ragucci), by
7 ordering him to resign from his position there so that it could be filled by Bobby Anastasia, who
8 was related to a Gambino Family member. Indictment ¶¶ 168-171.

9 In support of these charges, the government introduced testimony from Scollo, who stated
10 that in the summer of 2001, Ciccone (either directly or through Cassarino) ordered him to tell
11 Tommy Ragucci to leave his position. Tr. 1516. Scollo explained that Ciccone wanted to
12 remove Tommy Ragucci from the position so that Bobby Anastasia could be placed there. Tr.
13 1518. Scollo further testified that he carried out these orders, but that Tommy Ragucci said that
14 he would not resign. Tr. 1516-17.

15 Tommy Ragucci, in turn, testified that in approximately August of 2001, Scollo
16 approached him and stated "that his boss wanted me to step down." Tr. 1901. He asked Scollo
17 who his boss was; Scollo responded, "Sonny." *Id.* Tommy understood that this meant "Sonny
18 Ciccone." Tr. 1902. He stated that upon receiving this order, "I felt very – I would say I felt
19 intimidated." Tr. 1903. He subsequently had a "sit-down" with Scollo, at which point he asked
20 whether he could talk directly to Ciccone. *Id.* Scollo responded, "No way, can't happen." Tr.
21 1904. Tommy Ragucci then told Scollo that he was not willing to step down. *Id.* Scollo "was

1 very upset and he left.” *Id.*

2 The government also presented a July 19, 2001 wiretapped conversation in which
3 Ciccone told Cassarino that he wanted the “Bobby A” [Bobby Anastasia] task to be done “as
4 soon as possible,” Gov’t Exh. TR-118, as well as a July 26, 2001 wiretapped conversation, in
5 which Scollo reported to Ciccone: “I grabbed Tommy yesterday and I told him, listen to me.”
6 Gov Exh. TR-119. Ciccone responded, “Tell him I don’t want him there. Tell him I don’t want
7 him there. . . . Say you’re only there because I gave your brother [Carmine] a fucking chance.
8 That’s it. That’s it. Now you’re out.” Scollo replied, “I told him as soon as possible.” *Id.*
9 Ciccone reiterated, “And not the end of the summer. As soon as possible, maybe within the next
10 thirty days.”

11 Scollo subsequently reported, in an August 6, 2001 wiretapped conversation with
12 Cassarino, that “I spoke to Tommy. He said he don’t feel like he wants to step down.” Gov’t
13 Exh. TR-120. When Ciccone later learned that Tommy Ragucci was still in his position, he
14 remarked to Cassarino and Bondi, “We gonna do, we gotta get rid of this fuckin’ guy.” Gov’t
15 Exh. TR-121. Evidently, however, the matter was ultimately dropped, because as of the trial,
16 Tommy Ragucci was still working at the Howland Hook terminal. Tr. 1897.

17 **9. The Zinna Count**

18 This count alleged that certain defendants, including defendant-appellant Ciccone, had
19 conspired to extort \$5,000 from Leonardo Zinna (referred to in the indictment as “John Doe 2”),
20 after they learned that Zinna had charged two people \$3,000 each for waterfront jobs. Indictment
21 ¶ 173.

1 The evidence supporting this conspiracy charge was straightforward. At trial, the
2 government introduced into evidence a wiretapped conversation in which Ciccone stated to
3 Cassarino and Scollo, in regard to Zinna, “[G]et a hold of this guy He got to bring us
4 five ’Cause, you know what, you cocksucker? You took six. You gave back three.
5 Now we want five from you.” Ciccone reiterated: “Fuck him. Tell him I want five.” Gov’t
6 Exh. TR-115.

7 **10. The Marinelli Counts**

8 These counts alleged that certain defendants, including defendant-appellant Ciccone,
9 conspired to extort, and did extort, a certain sum of money from Nicola Marinelli (referred to in
10 the indictment as “John Doe 3”). Indictment ¶¶ 174-177.

11 At trial, the government adduced evidence that after Marinelli sought (at the suggestion
12 of his attorney, Tr. 2765-66) the help of Ciccone and Cassarino in obtaining his workmen’s
13 compensation payments, they extorted him for a portion of these proceeds. Specifically, wiretap
14 evidence demonstrated that after Marinelli was set to receive his payments, Cassarino ordered
15 Marinelli’s son, Vito, to bring money to him. In the wiretapped conversation, Cassarino asked
16 Vito whether everything had been “straightened out” with his father. Gov’t Exh. TR-222. When
17 Vito responded affirmatively, Cassarino responded, “Alright, ’cause you got to come and see me,
18 right?” *Id.* Vito then expressed nervousness (apparently about how much money to bring),
19 stating, “I wanna know what you think is the right thing. Know what I’m saying?” *Id.*
20 Cassarino responded, “I don’t know. Whatever you think. That’s what he [Ciccone] told me and
21 then they’ll just take it from there.” *Id.* Vito responded, “I, I, I don’t want to do the wrong

1 thing.” *Id.* Cassarino responded, “[I]f it’s wrong, I’ll tell ya.” Vito said, “we’re waiting for the,
2 ah, for the check. . . . Then we’ll come see ya.” *Id.*

3 Vito further testified at trial that he was “afraid to do the wrong thing,” and that after he
4 paid Cassarino \$5,000, Cassarino informed him that this was insufficient and that the payment
5 needed to be around \$20,000 to \$25,000. Tr. 2781-86. After Vito informed his father that
6 Cassarino and Ciccone were unsatisfied, the family ultimately paid another \$5,000. Tr. 2786-90.

7 **11. The Alayev Counts**

8 These counts alleged that certain defendants – including defendants-appellants Ciccone
9 and Bondi – had conspired to extort, and had extorted, the following property interests from
10 Eduard Alayev (referred to in the indictment as “John Doe 4”), the owner of a café in Brooklyn:
11 (1) money; (2) the right to refuse to keep illegal gambling machines at a business; and (3) the
12 right to sell a business free from outside pressure. Indictment ¶¶ 178-185.

13 At trial, Alayev testified that he and his business partner (his brother) had purchased the
14 café – called Café Roma – in October of 1999 from someone named Rocco Ritorto. Tr. 2478-
15 79.⁷ He further testified that about two months after purchasing Café Roma, Cassarino and
16 Bondi (whom Alayev referred to, respectively, as “Primo” and “Richie”) came together to tell
17 him that they wanted to install gambling machines at the cafe. Tr. 2488-89. Alayev refused, but
18 Cassarino “responded by saying, ‘Whether you want it or not, I’m going to install the gambling
19 machines.’” Tr. 2488. Cassarino stated that if Alayev would not let him install the machines,

⁷Evidently, however, legal ownership of the café was never transferred into Alayev’s name. Tr. 2508.

1 Alayev would have to pay him \$1,000 each month, adding that “the neighborhood [was] all his
2 territory.” *Id.* Alayev wanted to call the authorities, but was “very afraid for [his] family,” and
3 thus did not do so. Tr. 2492.

4 Alayev stated that three gambling machines were subsequently installed in the back room
5 of his restaurant while he was out shopping. Tr. 2492-93. Alayev told Cassarino that he was
6 afraid that if the gambling machines were found, Café Roma would lose its liquor license, to
7 which Cassarino responded, “[Y]ou are not going to be responsible for anything, if any tickets []
8 come, we’d pay your ticket.” Tr. 2493. Alayev added that Bondi began coming to Café Roma to
9 collect money from the machines, and would typically give him a portion of the proceeds. Tr.
10 2495-96.

11 The police subsequently appeared at Café Roma, broke all of the gambling machines,
12 and arrested Alayev. Tr. 2494. Alayev moved the broken machines down to the basement and
13 told Cassarino that the machines “are not going to be here anymore.” Tr. 2498. Someone
14 nonetheless subsequently came to Café Roma to install one or two new gambling machines. Tr.
15 2502. Alayev did not let the person install the machines. *Id.* Cassarino then called him and said
16 something “to the extent [of] ‘whether you want it or not, we’re going to install the machines.’”
17 *Id.* People later returned with the machines and stored them in the basement. Tr. 2503. Alayev
18 noted, “[i]t was not really possible to stop them because they were big people and like I’m really
19 like a small person. I couldn’t really stop them.” Tr. 2503. Alayev then closed the kitchen of the
20 restaurant, “[b]ecause the machines were there and I didn’t like the police to come again and see
21 the machines again.” *Id.*

1 In December of 2000, Alayev decided that he wanted to sell Café Roma. Tr. 2498.
2 Cassarino ultimately became closely involved in the details of this sale, telling Alayev that he
3 wanted Café Roma to be sold to someone named Lenny Kogan, and that Alayev “should not sell
4 it to anybody but Lenny.” Tr. 2504. He told Alayev that Kogan would pay \$40,000 for Café
5 Roma. *Id.* Cassarino ended up taking a portion of that money for himself. Tr. 2512-14.

6 In addition to Alayev’s trial testimony about these events, the government also
7 introduced wiretapped conversations in which Bondi provided Cassarino with information about
8 Alayev (whom they referred to as “Eddie”) and the goings-on at Café Roma. Gov’t Exh. TR-
9 300; Gov’t Exh. TR-313. For example, in one conversation, Bondi complained to Cassarino
10 about Alayev, stating “this cocksucker Eddie . . . was telling them he don’t want nobody walkin’
11 through his kitchen” (where the gambling machines were located). Gov’t Exh. TR-300.
12 Cassarino responded, “so grab the guy Eddie, and tell the guy Eddie, ‘who the fuck are you to tell
13 us that thing?’” Bondi said, “I told ‘em, I told ‘em.” *Id.* In other wiretapped conversations,
14 Cassarino reported to Ciccone about the details of the Café Roma sale. Gov’t Exh. TR-320;
15 Gov’t Exh. TR-324.

16 **12. The Seagal Counts**

17 These counts alleged that certain defendants, including defendant-appellant Ciccone,
18 conspired and attempted to extort the film actor Steven Seagal (referred to in the indictment as
19 “John Doe 5”), by trying to obtain money from him and attempting to get him to do business
20 with them. Indictment ¶¶ 58-59.

21 At trial, Steven Seagal testified that he became good friends with Jules Nasso (the brother

1 of Vincent Nasso of GPP/VIP) in the late 1980s. Tr. 2928-29. At Jules Nasso's request, Seagal
2 brought him into the movie business, and the two men formed a production company called
3 Seagal-Nasso. Tr. 2930. In the mid-1990s, however, Seagal grew to believe that Jules Nasso's
4 personality had changed. Tr. 2931-32. He decided that he did not want to work with Jules Nasso
5 any longer and severed the business relationship in the late 1990s. Tr. 2933-34. According to
6 Seagal, Jules Nasso was unhappy about the end of the relationship, and told Seagal that Seagal
7 owed him approximately one million dollars. Tr. 2935. Seagal's accountants and attorneys,
8 however, disagreed, telling Seagal that Jules Nasso owed him money, rather than vice versa. Tr.
9 2935.

10 In October of 2000, during the making of the movie "Exit Wounds" in Toronto, Seagal
11 received a visit from Jules Nasso's brother, Vincent Nasso, along with Ciccone and Cassarino.
12 Tr. 2937-39. At that meeting, according to Seagal, Ciccone told him that he thought it would be
13 "really nice if I worked with Jules again and that Jules' mother also wanted us to work together."
14 Tr. 2939. When Seagal indicated that he was not sure whether that would be possible, Ciccone
15 became silent, making Seagal feel uncomfortable. Tr. 2939-2940.

16 Seagal testified that he later met with Ciccone in New York, after having received many
17 calls from Vincent Nasso telling him that Ciccone "wanted to see me." Tr. 2942. When Seagal
18 arrived at the Nassos' mother's house for the meeting, he was informed that the meeting had
19 been moved somewhere else, which made Seagal feel "increasingly uncomfortable." Tr. 2943.
20 Seagal then got into a car (accompanied by his assistant) and was taken to a restaurant, where
21 Ciccone, Cassarino, Jules Nasso, and Vincent Nasso were sitting at an upstairs table. Tr. 2944.

1 Ciccone began talking to Seagal about “monies that I owed Jules . . . he then went into the fact
2 that he wanted me to work with Jules and that was important to him and I again told him that I’m
3 trying.” Tr. 2945-46. At this point, Ciccone ordered him to “look at me when you are talking.”
4 Tr. 2946. Ciccone then said: “Look, we’re proud people and you work with Jules . . . Jules is
5 going to get a little and the pot will be split up We’ll take a little.” *Id.* The meeting ended
6 with Seagal stating that he “would try to work with Jules.” Tr. 2947. Seagal testified that as he
7 walked out of the restaurant, Jules started walking with him and said “something to the effect of
8 ‘You know, it’s a good thing you said this and didn’t say that because if you would have said the
9 wrong thing, they were going to kill you.’” Tr. 2948.

10 Seagal further testified that on the morning of the March 2001 premiere of “Exit
11 Wounds,” Ciccone – accompanied by Jules and Vincent Nasso, Cassarino, and another man –
12 showed up at his home, at which point Ciccone claimed that Seagal owed them \$3 million,
13 stating “I told you what I want and I don’t think you are getting it.” Tr. 2956. Ultimately, Seagal
14 paid Jules Nasso between \$500,000 and \$700,000, which he testified at trial arose from a
15 previous “stock issue where he had put some of his own money up to buy stock with me.” Tr.
16 2957. Seagal also contacted a former acquaintance of his, who was then in prison in New
17 Jersey, and “explained to him this misunderstanding that was going on and I asked him if he
18 could speak with these people on my behalf, be sort of a peacemaker and see if there is a way that
19 this all could be settled in a businesslike manner.” Tr. 2960-62. After that, Jules and Vincent
20 Nasso came to Seagal’s home and told him to “forget about Sonny, forget about us, forget about
21 everything, good-bye.” Tr. 2962. Jules subsequently filed a \$60 million civil lawsuit against

1 Seagal. Tr. 2962-63.

2 The government also introduced a wiretapped conversation in which Ciccone and Jules
3 Nasso discussed their interactions with Steven Seagal, and in which Ciccone stated, “We were
4 gonna tell [Seagal] that every movie he makes . . . we want a hundred and fifty thousand,” and
5 told Jules, “I want you to talk to him Don’t treat him with kid gloves.” Gov’t Exh. TR-257.

6 **13. The Gambling Counts**

7 These counts alleged that certain defendants, including Ciccone and Bondi, had run an
8 illegal bookmaking business as well as an illegal joker-poker gambling operation. Indictment ¶¶
9 202-205. The bookmaking charge rested on the allegation that Ciccone, Bondi, and other
10 Gambino Family co-defendants had run the New York operation of the Costa Rica-based Pelican
11 Sports bookmaking business from approximately September 18, 2000 to December 2001. The
12 joker-poker charge rested on the allegation that several defendants, including Ciccone and Bondi,
13 had operated a large-scale gambling business that employed joker-poker electronic gambling
14 devices, including those placed at Café Roma.

15 a. The Bookmaking Charges

16 At trial, with regard to the bookmaking charges, the government adduced evidence that
17 numerous defendants – including defendants-appellants Bondi and Ciccone as well as defendants
18 Cassarino, Brancato, Malara, Orsino, and Lisi – had collectively run the New York operation of
19 the Pelican Sports bookmaking business. This evidence included various wiretapped
20 conversations that indicated the respective roles of Bondi and Ciccone in the operation. As to
21 Bondi, the wiretaps indicated that he participated in paying winning bettors, collecting from

1 losing bettors, and “freezing” bettors who owed money. Indeed, in one conversation between
2 Bondi and Cassarino, Bondi reported that they had to freeze a particular bettor, stating, “He don’t
3 have it till Wednesday. . . . So he’s froze.” Gov’t Exh. TR-515. Cassarino responded, “[W]hat is
4 he, what is he up, up or minus? . . . That’s the important part before you freeze
5 him If he’s up, you don’t want to freeze him.” *Id.* Bondi responded, “Alright, well let me
6 call, I call him right, then I call you back.” *Id.* Approximately six minutes later, Bondi called
7 back to report that the bettor was “minus twenty-two,” to which Cassarino replied, “Good.
8 Freeze it.” Gov’t Exh. TR-516. Similarly, in a conversation between co-defendants Cassarino
9 and Lisi, the men discussed the need to talk to “Richie” [Bondi] about a bettor who wanted to
10 “straighten out now, so he could play tonight.” Gov’t Exh. TR-508.

11 The wiretap evidence also indicated that Ciccone acted as the ultimate supervisor of the
12 bookmaking business, with Cassarino reporting directly to him. In several wiretapped
13 conversations between Cassarino and Ciccone, Cassarino provided an update as to the various
14 business developments. On October 1, 2001, Cassarino reported to Ciccone, “[W]e had a decent
15 fuckin’ week.” Gov’t Exh. TR-426. Ciccone asked, “How many guys are bettin’[?]” *Id.*
16 Cassarino responded: “About ah . . . thirty . . . thirty guys . . .but see one guy we got on
17 commission. . . one guy, in other words, one, one guy is on a forty percent sheet. . . the kid
18 Jerome [Orsino]. . . we get all his players. . . instead of givin’ him fifty-fifty sheet we’re givin’
19 him forty percent.” *Id.* Ciccone replied, “Now you’re gonna give him thirty.” *Id.* Cassarino
20 replied, “Cut him down to thirty, yeah . . . come down thirty . . . he’ll do us a favor . . . don’t

1 worry about it.”⁸ *Id.*

2 The government also introduced wiretapped conversations between a number of co-
3 defendants who had participated in the operation. For example, in one wiretapped conversation
4 between Brancato and Malara, Brancato referred to a particular player, “Soldier,” with whom he
5 had experienced “a little problem.” Gov’t Exh. TR-555. In a subsequent conversation, Malara
6 told Brancato, “Soldier’s gettin’, well, you know, I, I got him for the week plus twenty-eight-ten.
7 . . . And the other guy. . . . I believe you’re collecting like fourteen and change, turning seventy-
8 one–o-seven.” Gov’t Exh. TR-563. Brancato then stated, “What I’m gonna do, I’ll straighten the
9 whole thing out with you.” *Id.*

10 In addition, the government introduced Detective Martin’s testimony that documents with
11 betting figures had been seized from the residences of Cassarino and Lisi. Tr. 3452-56.
12 Detective Martin explained that the documents from Cassarino’s residence listed the “weekly
13 figures of each person” in the stable of bettors that was managed by the co-defendants, and that
14 the figures were broken down by “the account number, the name, each day of the week, how
15 much they’re up or down and their [betting] cap at the end.” Tr. 3453. He stated that the
16 documents seized from Lisi’s residence included figures for three particular bettors managed by

⁸At trial, New York City Police Department Detective Kevin Martin (an expert on the subject of illegal gambling) explained that this meant that “Jerome Orsino ha[d] a 40 percent sheet, meaning someone has a sheet arrangement, arrangement with bettors on — under his sheet. He has to have some type of arrangement with the bookmaker. Either you [are] submitting 50-50 sheet, you are submitting half the winnings, half the losings. They all do go from there 40 percent or 30 percent or quarter sheet, 25 percent sheet.” Tr. 3436. When asked what the difference was between a 40 percent sheet and a 30 percent sheet, Detective Martin explained that it referred to “how much either gives out or adds in.” Tr. 3437.

1 Lisi. Tr. 3454-55. One bettor appears to have been up by \$5800 for the week; another was listed
2 as being up by \$3380. Tr. 3456. Detective Martin also testified that documents removed from
3 Bondi's residence included gambling records. Tr. 3456-57.

4 b. The Joker-Poker Charges

5 On the joker-poker charges, the government presented evidence at trial that Ciccone,
6 Bondi, and other co-defendants had run a gambling operation using "joker-poker" electronic
7 gambling machines at a number of locations, including Café Roma. In addition to Alayev's
8 testimony about the defendants' having forced him to install gambling machines at Café Roma,
9 the government also introduced the testimony of various law enforcement officials. For example,
10 Detective Paul Grzegorski of the New York City Police Department testified that on August 23,
11 2000, he observed Bondi entering Frank & Sal's Hair Stylists in Brooklyn, going over to a
12 gambling device located therein, opening the device with a key, and removing the currency from
13 the device. Tr. 3236-39. When asked to describe the device, Detective Grzegorski stated, "You
14 put money into it and you bet credits and you play the credits and you get basically what is called
15 extended play. If you win, you get additional credits and you can get paid off on those credits."
16 Tr. 3238. Detective Grzegorski further stated that after observing this, he stopped Bondi as he
17 was exiting the shop and placed him under arrest. Tr. 3239. He then searched Bondi and found
18 on his person a list of locations with gambling devices. Tr. 3240-3253. Detective Martin
19 provided additional testimony as to how the gambling devices in question worked: "You insert a
20 sum of U.S. currency into the machine, you receive credits for your currency, and you play those
21 credits, and during that course of the game you play the credits until you win a game, if it is

1 cherries, bells, plums, whatever it may be.” Tr. 3508.

2 **14. The Witness Tampering Count**

3 This count alleged that certain defendants, including defendant-appellant Ciccone, had
4 tampered with a witness in this case before it went to trial. Indictment ¶ 206. That witness was
5 Bondi’s stepson, Anthony Frazetta, whom the government had served with a grand jury
6 subpoena.

7 At trial, the government adduced wiretap evidence indicating that in a February 11, 2002
8 conversation between Ciccone, Bondi, and co-defendant Primo Cassarino, Ciccone said the
9 following about Frazetta: “This fucking Joe, I don’t know where the fuck his mentality is. If, if,
10 if you start to answer and they can ask you everything and anything . . . Every fucking thing has
11 got nine fucking questions. You know what I’m saying? He goes, so how’d you get this
12 job? It was my father, my father. Who is your father’s friend? Sonny Ciccone. . . . He’s taking
13 the [F]ifth. I don’t want to hear it.” Gov’t Exh. TR-461. When Cassarino indicated that Frazetta
14 had apparently provided some information already, Ciccone responded, “yeah, but why, but he
15 opened up a Pandora’s Box. ’Cause they ask you one question, they ask you another.” *Id.*

16 On February 18, 2002, Frazetta’s lawyer advised the government by letter that Frazetta
17 would assert his Fifth Amendment privilege against self-incrimination. On February 20, 2002,
18 when Frazetta was scheduled to appear before the grand jury, Cassarino commented to Ciccone,
19 “[T]hat kid is going there today.” Gov’t Exh. TR-462. The next day, Ciccone asked Cassarino,
20 “how’d Richie’s kid do?” Gov’t Exh. TR-463. Cassarino reported that there had been some
21 uncertainty as to whether the court would accept Frazetta’s letter asserting the privilege, and that

1 apparently Frazetta would have to return in person. *Id.* Cassarino noted that he had told Bondi
2 that Frazetta “shoulda went there with the lawyer and fucking hand in the letter. If they accept it,
3 they accept it; they don’t accept it, you’re there.” *Id.* Ciccone replied, “That was stupid, what
4 the lawyer did. He shoulda made him go there anyway.” *Id.* Cassarino reiterated: “Just go in
5 there, do what you gotta do, and get the fuck out That’s all, you take the [F]ifth and that’s it.
6 Goodbye.” *Id.* Ciccone agreed: “That’s the end of it.” *Id.*

7 **C. The Verdicts**

8 **1. Peter Gotti**

9 Peter Gotti was convicted of Racketeering (Count 1), Racketeering Conspiracy (Count 2),
10 Money Laundering Conspiracy (Count 28), and on the Money Laundering Counts as to 10/17/00
11 (Count 31), 11/28/00 (Count 32), 1/23/01 (Count 35), 2/27/00 (Count 37), 3/28/01 (Count 38),
12 and 4/24/01 (Count 40).

13 He was acquitted of Money Laundering as to 9/19/00 (Counts 30) and 12/26/00 (Count
14 34).

15 **2. Richard G. Gotti**

16 Richard G. Gotti was convicted of Racketeering (Count 1), Racketeering Conspiracy
17 (Count 2), Money Laundering Conspiracy (Count 28), and on the Money Laundering Counts as
18 to 6/27/01 (Count 42), 8/31/01 (Count 43), 10/25/01 (Count 45), and 11/29/01 (Count 46).

19 **3. Anthony Ciccone**

20 Ciccone was convicted of Racketeering (Count 1), Racketeering Conspiracy (Count 2),
21 Conspiracy to Extort ILA (Count 3), Extortion of the ILA (Count 4), Scheme to Defraud the

1 Membership of the ILA (Counts 6 and 7), Conspiracy to Extort MILA (Count 8), Extortion of
2 MILA (Count 9), Scheme to Defraud MILA as to 9/11/00 (Count 11), Scheme to Defraud MILA
3 as to 9/16/01 (Count 13), Conspiracy to Extort Local 1 (Count 14), Attempted Extortion of Local
4 1 (Count 15), Scheme to Defraud Local 1 as to 6/30/00 and 6/27/01 (Counts 17 and 18), Scheme
5 to Defraud Local 1814 as to 11/3/00, 2/7/01, 6/17/01, and 8/22/01 (Counts 20-23), Conspiracy to
6 Extort Howland Hook Container Terminal (Count 24), Extortion of Howland Hook Container
7 Terminal (Count 25), Conspiracy to Extort Owner of a Trucking Company (Count 26), Extortion
8 of Owner of a Trucking Company (Count 27), Money Laundering Conspiracy (Count 28), Money
9 Laundering as to multiple dates (Counts 29-35, 37-46), Conspiracy to Extort John Doe 1 (Count
10 49), Attempt to Extort John Doe 1 (Count 50), Conspiracy to Extort John Doe 2 (Count 51),
11 Conspiracy to Extort John Doe 3 (Count 52), Extortion of John Doe 3 (Count 53), Conspiracy to
12 Extort John Doe 4 (Count 54), Extortion of John Doe 4—Money (Count 55), Extortion of John
13 Doe 4—Right to Refuse to Keep Gambling Machines at a Business (Count 56), Extortion of John
14 Doe 4—Right to Sell a Business (Count 57), Conspiracy to Extort John Doe 5 (Count 58),
15 Attempted Extortion of John Doe 5 (Count 59), Illegal Gambling Business— Joker/Poker (Count
16 66), Illegal Gambling Business—Sports Betting Operation (Count 67), and Witness Tampering
17 (Count 68).

18 He was acquitted as to Scheme to Extort MILA as to 11/14/01 (Count 12), Conspiracy to
19 Extort Relatives of a Prospective Employee (Count 47), Extortion of Relatives of a Prospective
20 Employee (Count 48), Conspiracy to Use Extortionate Means to Collect an Extension of Credit
21 from John Doe 8 (Count 64), and Use of Extortionate Means to Collect an Extension of Credit

1 from John Doe 8 (Count 65).

2 **_____4. Richard Bondi**

3 Bondi was convicted of Racketeering (Count 1), Racketeering Conspiracy (Count 2),
4 Conspiracy to Extort Local 1 (Count 14), Attempted Extortion of Local 1 (Count 15), Scheme to
5 Defraud Local 1 (Counts 17-18), Conspiracy to Extort John Doe 4 (Count 54), Extortion of John
6 Doe 4—Money (Count 55), Extortion of John Doe 4—Right to Refuse to Keep Gambling
7 Machines at a Business (Count 56), Extortion of John Doe 4—Right to Sell a Business (Count
8 57), Illegal Gambling Business-Joker/Poker (Count 66), and Illegal Gambling Business—Sports
9 Betting Operation (Count 67).

10 He was acquitted as to Conspiracy to Use Extortionate Means to Collect an Extension of
11 Credit from John Doe 7 (Count 62) and Use of Extortionate Means to Collect an Extension of
12 Credit from John Doe 7 (Count 63).

13 **D. The Sentences**

14 **1. Peter Gotti**

15 **_____**Peter Gotti was sentenced to a term of imprisonment of 115 months, less 85 days that he
16 had served in administrative confinement. The district court also imposed an order of forfeiture
17 against Peter Gotti in the amount of \$3,749,250.

18 **2. Richard G. Gotti**

19 Richard G. Gotti was sentenced to a term of imprisonment of 33 months. As noted
20 above, his sentence has already been remanded to the district court pursuant to *Crosby*; upon
21 reconsideration, the district court declined to resentence him.

1 **3. Anthony Ciccone**

2 Ciccone was sentenced to a term of imprisonment of 180 months. He also received an
3 order of restitution of \$1,601,499 and an order of forfeiture of \$1,636,499.

4 **4. Richard Bondi**

5 Bondi was sentenced to a term of imprisonment of 57 months and an order of restitution
6 of \$311,894.

7 **II. CHALLENGES BY THE DEFENDANTS TO THEIR CONVICTIONS**

8 **A. The Defendants' Challenge under *Scheidler v. National Organization for Women,***
9 ***Inc.*, 537 U.S. 393 (2003) ("*Scheidler II*")**

10 The defendants-appellants first argue that numerous extortion counts in the indictment
11 became invalid upon the issuance of *Scheidler II*, which was decided by the Supreme Court on
12 February 26, 2003, just as the trial in this case was concluding. For Ciccone and Bondi, who
13 were charged with and convicted of multiple Hobbs Act extortion counts (both as separate
14 offenses and as RICO predicates, as set forth in detail above), this argument goes to their actual
15 convictions. For Peter Gotti and Richard G. Gotti, this is a sentencing issue: they were not
16 charged with extortion, but the extortion counts included in the indictment were considered by
17 the district judge as relevant uncharged conduct under the Sentencing Guidelines when imposing
18 their sentences.
19

20 It is undisputed that we evaluate the legal issues of whether the indictment properly
21 charged Hobbs Act extortion and whether the district court correctly charged the jury on these
22 counts under a *de novo* standard. In assessing these issues, we begin by discussing *Scheidler II*
23 and analyzing its scope. We then apply our interpretation of *Scheidler II* to each of the

1 challenged extortion counts in this case, and ultimately conclude that each of them can stand.

2 1. **The *Scheidler II* Decision**

3 *Scheidler II*, as set forth below, tightened the requirements for finding that a defendant
4 has committed extortion under the Hobbs Act. To appreciate the significance of *Scheidler II*, it is
5 therefore necessary to begin with the text of the Hobbs Act, upon which the challenged extortion
6 counts here rested. It provides:

7 Whoever in any way or degree obstructs, delays, or affects commerce or the movement of
8 any article or commodity in commerce, by robbery or *extortion or attempts or conspires*
9 *so to do*, or commits or threatens physical violence to any person or property in
10 furtherance of a plan or purpose to do anything in violation of this section shall be fined
11 under this title or imprisoned not more than twenty years, or both.

12
13 18 U.S.C. § 1951(a) (emphasis added). The Hobbs Act further defines “extortion” as

14
15 *the obtaining of property from another*, with his consent, induced by wrongful use of
16 actual or threatened force, violence, or fear, or under color of official right.

17
18 18 U.S.C. § 1951(b)(2) (emphasis added).

19
20 Before *Scheidler II*, this Circuit (and others) had interpreted the phrase “the obtaining of
21 property from another” quite broadly, in two key respects: (1) “property” had been held to
22 encompass intangible as well as tangible property rights; and (2) “obtaining” had been held to
23 encompass cases where the defendant caused a loss of or interference to the victim’s property
24 rights, even though the defendant had not actually sought to exercise those property rights for
25 himself or herself. Clear examples of these two propositions can be found in our precedents.

26 As to the first proposition – namely, the expansive interpretation of “property” – our
27 Circuit’s decision in *United States v. Tropicano*, 418 F.2d 1069 (2d Cir. 1969), stands as an early
28 landmark case. The *Tropicano* defendants were partners in a garbage collection company who

1 were displeased when a new competitor, Caron Refuse Removal, Inc. (“Caron”), started
2 soliciting business in their vicinity and taking away some of their customers. *Id.* at 1072. They
3 then used threats of violence to force Caron to stop recruiting their customers and to agree not to
4 solicit any business in the area. *Id.* On appeal, this Court upheld the *Tropiano* defendants’
5 Hobbs Act extortion convictions, rejecting their argument that “nothing more than ‘the right to
6 do business’ in the Milford area was surrendered by Caron and that such a right was not
7 ‘property’ ‘obtained’ by the appellants.” *Id.* at 1075. We explained:

8 The concept of property under the Hobbs Act, as devolved from its legislative history and
9 numerous decisions, is not limited to physical or tangible property or things but includes,
10 in a broad sense, any valuable right considered as a source or element of wealth and does
11 not depend upon a direct benefit being conferred on the person who obtains the property.

12 Obviously, Caron had a right to solicit business from anyone in any area without
13 any territorial restrictions by the appellants and only by the exercise of such a right could
14 Caron obtain customers whose accounts were admittedly valuable. Some indication of
15 the value of the right to solicit customers appears from the fact that when the [*Tropiano*
16 defendants’ company’s] accounts were sold for \$53,135, [the] agreement [obtained from
17 Caron] not to solicit those customers was valued at an additional \$15,000. . . . Caron’s
18 right to solicit accounts in Milford, Connecticut constituted property within the Hobbs
19 Act definition.
20

21 *Id.* at 1075-76 (internal citations omitted). More recently, this Circuit similarly held that “[t]he
22 right of the members of a union to democratic participation in a union election is property; that
23 the right is intangible does not divest it of protection under the Hobbs Act,” and on that basis,
24 crime families who sought to replace control of the union could be found guilty of conspiracy to
25 commit extortion. *United States v. Bellomo*, 176 F.3d 580, 592-93 (2d Cir. 1999).

26 As for the second proposition (the expansive interpretation of “obtaining”), in *United*
27 *States v. Arena*, 180 F.3d 380 (2d Cir. 1999), this Court held – in a case involving anti-abortion
28 protestors who tried to shut down a clinic – that the “obtaining” prong of the Hobbs Act’s

1 definition of “extortion” was satisfied in cases where an extortionist used violence to force his
2 victim to abandon the property rights in question, even though the extortionist was not seeking to
3 exercise those property rights for himself. The *Arena* Court explained that “where the property
4 in question is the victim’s right to conduct a business free from threats of violence and physical
5 harm, a person who has committed or threatened violence or physical harm in order to induce
6 abandonment of that right has obtained, or attempted to obtain, property within the meaning of
7 the Hobbs Act.” *Id.* at 394.

8 This second proposition was evaluated by the Supreme Court in *Scheidler II*, which
9 implicated facts similar to those in *Arena*. In *Scheidler II*, the defendants were anti-abortion
10 protestors who had attempted to shut down abortion clinics. 537 U.S. at 398. The plaintiffs
11 argued that these defendants – “by using or threatening to use force, violence, or fear to cause
12 respondents ‘to give up’ property rights, namely, ‘a woman’s right to seek medical service from a
13 clinic, the right of the doctors, nurses, or other clinic staff to perform their jobs, and the right of
14 the clinics to provide medical services free from wrongful threats, violence, coercion, and fear”
15 – had committed extortion under the Hobbs Act. *Id.* at 400-401. The Seventh Circuit agreed,
16 stating that “the defendants assert that, even if ‘property’ was involved, the defendants did not
17 ‘obtain’ that property; they merely forced the plaintiffs to part with it . . . [but] this argument is
18 contrary to a long line of precedent in this circuit.” *Nat’l Org. for Women, Inc. v. Scheidler*, 267
19 F.3d 687, 709 (7th Cir. 2001).

20 The Supreme Court reversed. Initially, the Court noted that on appeal, the respondents
21 “had shifted the thrust of their theory” with regard to precisely which property rights had been

1 extorted from them. *Scheidler II*, 537 U.S. at 401. It stated that although the respondents had
2 argued below that the extorted property rights were those of the women and the clinics to receive
3 and perform medical services, they

4 now assert that petitioners violated the Hobbs Act by “seeking to get control of the use
5 and disposition of respondents’ property.” They argue that because the right to control
6 the use and disposition of an asset is property, petitioners, who interfered with, and in
7 some instances completely disrupted, the ability of the clinics to function, obtained or
8 attempted to obtain respondents’ property.

9 The United States offers a view similar to that of respondents, asserting that
10 “where the property at issue is a business’s *intangible* right to exercise exclusive control
11 over the use of its assets, [a] defendant obtained that property by obtaining control over
12 the use of those assets.”
13

14 *Id.* (internal citations omitted; alteration and emphasis in original).

15 The Court then concluded that even this revised construction was inconsistent with the
16 Hobbs Act’s explicit reference to “obtaining of property from another,” 18 U.S.C. § 1951(b)(2).

17 *See id.* at 402. It stated that

18 [w]e need not now trace what are the boundaries of extortion liability under the Hobbs
19 Act, so that liability might be based on obtaining something as intangible as another’s
20 right to exercise exclusive control over the use of a party’s business assets. . . . Whatever
21 the outer boundaries may be, the effort to characterize petitioners’ actions here as an
22 ‘obtaining of property from’ respondents is well beyond them.
23

24 *Id.* The Court went on to state that the anti-abortion protesters had neither

25 pursued nor received something of value from respondents that they could exercise,
26 transfer, or sell. To conclude that such actions constituted extortion would effectively
27 discard the statutory requirement that property must be obtained from another, replacing
28 it instead with the notion that merely interfering with or depriving someone of property is
29 sufficient to constitute extortion.
30

31 *Id.* at 405 (internal citation and quotation marks omitted).

32 The Court also explained that such a construction would eliminate the distinction

1 between “extortion and the separate crime of coercion. . . . The crime of coercion, which more
2 accurately describes the nature of petitioners’ actions, involves the use of force or threat of force
3 to restrict another’s freedom of action.” *Id.* The Court found it telling that in drafting the Hobbs
4 Act, Congress had specifically included extortion as a Hobbs Act violation, while not including
5 coercion. *Id.* at 406-07. The Court concluded that “[b]ecause . . . [the anti-abortion protestors]
6 did not obtain or attempt to obtain property from respondents, . . . there was no basis upon which
7 to find that they committed extortion under the Hobbs Act.” *Id.* at 409.

8 Justice Stevens, the lone dissenter, protested that the *Scheidler II* majority’s “murky
9 opinion seems to hold that this phrase [‘the obtaining of property from another’] covers nothing
10 more than the acquisition of tangible property,” and that “[n]o other federal court has ever
11 construed this statute so narrowly.” *Id.* at 412 (Stevens, *J.*, dissenting). In other words, Justice
12 Stevens argued that *Scheidler II* had struck down not only the second proposition (the expansive
13 definition of “obtaining”) but also the first proposition (the expansive definition of “property”).
14 *Id.* at 412-16.

15 The majority opinion, however, expressly disclaimed the notion that it swept so broadly.
16 Indeed, in addition to stating that it “need not now trace what are the outer boundaries of
17 extortion liability under the Hobbs Act,” such as whether “liability might be based on obtaining
18 something as intangible as another’s right to exercise exclusive control over the use of a party’s
19 business assets,” the majority explicitly stated that “the dissent is mistaken to suggest that our
20 decision reaches, much less rejects, lower court decisions such as . . . *Tropiano* . . . , in which the
21 Second Circuit concluded that the intangible right to solicit refuse collection accounts constituted

1 property within the Hobbs Act definition.” *Id.* at 402 & n.6 (internal quotation marks omitted).

2 In construing the scope of the *Scheidler II* holding, we are guided by the majority’s
3 explicit statement that *Scheidler II* did not even reach, much less reject, our holding in *Tropiano*.
4 Indeed, we believe that the appropriate interpretation of *Scheidler II* must be one that co-exists
5 with *Tropiano*, both as to the “property” and “obtaining” prongs. Thus, as an initial matter, we
6 easily conclude that *Scheidler II* did not overturn *Tropiano*’s broad interpretation of the Hobbs
7 Act’s reference to “property,” nor otherwise suggest that only tangible property rights can be
8 extorted under the Hobbs Act. The *Scheidler II* majority, in going out of its way to emphasize
9 that it was not reaching *Tropiano*, essentially said as much. Indeed, *Scheidler II* consistently
10 emphasized that it was only tightening the “obtaining” requirement of the Hobbs Act, and that in
11 this regard, an important inquiry was whether the defendants had “pursued [or] received
12 something of value from [victims] that they could exercise, transfer, or sell.” *Id.* at 405 (internal
13 quotation marks omitted). In the case of the anti-abortion protestors who sought only to shut
14 down abortion clinics, they had not. Generally speaking, however, intangible property rights –
15 such as, for instance, non-competition or exclusivity agreements – are certainly things of value
16 that are capable of being exercised, transferred, or sold. We therefore read *Scheidler II* as leaving
17 intact this Circuit’s precedent that intangible property rights can qualify as extortable property
18 under the Hobbs Act and as simply clarifying that before liability can attach, the defendant must
19 truly have obtained (or, in the case of attempted extortion, sought to obtain) the property right in
20 question.

21 The more complex question is precisely what, pursuant to *Scheidler II*, it means to

1 “obtain” a property right. The *Scheidler II* Court framed this question as a two-part inquiry that
2 requires both a deprivation and an acquisition of property, explaining that while the anti-abortion
3 protestors in that case “may have deprived or sought to deprive respondents of their alleged
4 property right of exclusive control of their business assets, . . . they did not acquire any such
5 property.” *Id.* at 404-05. In further explaining why the anti-abortion protestors could not be
6 viewed as having acquired such property, the Court stated that they had “neither pursued nor
7 received something of value from respondents that they could *exercise, transfer, or sell.*” *Id.* at
8 405 (emphasis added) (internal quotation marks omitted).

9 This explanation, in our view, provides the key to understanding what it means, pursuant
10 to *Scheidler II*, to acquire property and thus to obtain it. We read the Court’s emphasis on the
11 possibility of exercising, transferring, or selling the property as a concern with the extortionist’s
12 *intent* with respect to the property at issue. The “ultimate goal” of the anti-abortion protestors in
13 *Scheidler II* was merely “‘shutting down’ a clinic that performed abortions.” *Id.* at 405. This did
14 not constitute acquisition in the eyes of the *Scheidler II* Court, we believe, because there was no
15 further intended activity on the part of the protestors, and mere interference with the clinics’ right
16 to conduct their business, even to the point of getting them to cease conducting their business
17 altogether, was closer to coercion than extortion. But had the protestors sought to take further
18 action after having deprived the clinics of their right to conduct their business as they wished –
19 by, for example, forcing the clinic staff to provide different types of services, forcing the clinic to

1 turn its operations over to the protestors, or selling the clinic or its property to a third party⁹ – we
2 believe that they would have satisfied the *Scheidler II* Court’s definition of “obtaining.”

3 Against this backdrop, it becomes clear why the Supreme Court indicated that *Tropiano*
4 remains good law notwithstanding *Scheidler II*. The *Scheidler II* Court characterized the right at
5 issue in *Tropiano* as “the intangible right to solicit refuse collection accounts.” *Id.* at 402 n.6.
6 Had the *Tropiano* defendants sought merely to get Caron to stop soliciting collection accounts
7 because they believed that the Milford area should be entirely free from any solicitation,
8 *Tropiano* could not stand; like the anti-abortion protestors, the *Tropiano* defendants would have
9 been seeking simply to deprive someone of a right without doing anything affirmative with that
10 right themselves. But unlike the anti-abortion protestors, the *Tropiano* defendants *did* seek to
11 take action with respect to Caron’s solicitation rights; they sought to transfer those rights to
12 themselves so that they could continue their own solicitation unimpeded by competition, and
13 thus, in a sense, broaden their own solicitation rights. In other words, the *Tropiano* defendants
14 essentially forced Caron to give them – at no cost – a non-competition agreement, which,

⁹These three examples illustrate various ways in which an extortion victim’s property right might be exercised, transferred, or sold by an extortionist. In the first example, the victim is ordered to exercise his or her rights in accordance with the extortionist’s wishes, such that the extortionist is essentially controlling the exercise of those rights. In the second example, the victim is ordered to transfer his or her rights over to the extortionist so that the extortionist can simply exercise those rights himself or herself. (A closely related variant would be where the extortionist orders the victim to transfer the rights to a third party of the extortionist’s choosing.) In the third example, the victim’s right is sold by the extortionist to a third party of the extortionist’s choosing. The precise demarcation between an exercise and a transfer may certainly be subject to debate. Because the critical question is simply whether the defendant sought to exercise, transfer, *or* sell the rights at issue, however, we are less concerned with line-drawing between those terms than with the unifying principle for the “exercise, transfer, or sale” framework: the defendant’s intent to do something affirmative with respect to the property right.

1 according to the *Tropiano* Court, was valued at about \$15,000, and they used that non-
2 competition agreement to further their own business activities. *Tropiano*, 418 F.2d at 1076.
3 Their goal was ultimately to enrich themselves, something that could not be accomplished
4 without appropriating to themselves the economic value of Caron’s property rights. These
5 actions, unlike those in *Scheidler II*, constituted extortion under the Hobbs Act.

6 Thus, we hold that in evaluating an extortion count’s conformity with *Scheidler II* – i.e.,
7 whether it adequately alleges the “obtaining of property” for purposes of the Hobbs Act’s
8 definition of extortion – the key inquiry is whether the defendant is (1) alleged to have carried
9 out (or, in the case of attempted extortion, attempted to carry out) the deprivation of a property
10 right from another, with (2) the intent to exercise, sell, transfer, or take some other analogous
11 action with respect to that right. A motive ultimately to profit by cashing out the value of the
12 property right will generally serve as powerful evidence that the defendant’s goal was to obtain
13 the right for himself, rather than merely to deprive the victim of that right.

14 We thus proceed to apply this test to each of the challenged extortion counts.

15 2. The Challenged Extortion Counts

16 On appeal, the defendants-appellants cite the following counts in the indictment as being
17 invalidated by *Scheidler II*: the ILA-related extortion counts; the Local 1-related extortion
18 counts; the MILA-related extortion counts; the Tommy Ragucci Counts; the Alayev Counts; and
19 the Seagal Counts. They argue that in each of these counts, the allegations support only a charge
20 of coercion, not extortion. Relatedly, they argue that the district court’s charge as to each of
21 these counts was inconsistent with *Scheidler II*. We therefore assess each count to determine

1 whether it is consistent with our construction of *Scheidler II*, first looking at how each count was
2 framed in the indictment, and then considering how the district court ultimately described each
3 count to the jury when issuing its charge.

4 a. The Indictment

5 _____i. *The ILA and Local 1 Counts*

6 On both the ILA-related and Local 1-related extortion counts, the indictment alleged that
7 the defendants sought to obtain, and did obtain, the union members' LMRDA rights to free
8 speech and democratic participation in union affairs as well as their LMRDA rights to loyal
9 representation by their officers, agents, and other representatives. It further stated that the
10 defendants sought to exercise those rights themselves, by telling various delegates whom to vote
11 for in certain leadership positions, and by controlling various elected officials' performance of
12 their union duties. We believe that these allegations satisfy our interpretation of *Scheidler II*,
13 because the government charges not only that the defendants caused the relinquishment of the
14 union members' LMRDA rights, but also that the defendants did so in order to exercise those
15 rights for themselves – indeed, in a way that would profit them financially.

16 We note that the defendants-appellants have also argued that these counts must fail
17 because they could not *legally* exercise the union members' LMRDA rights, and therefore cannot
18 be said to have obtained them. This argument builds upon a recent split that has emerged, post-
19 *Scheidler II*, among various district courts in this Circuit. Three of the four district courts
20 considering this issue – the district court in this case, *see* March 26, 2004 Sentencing Tr. 10-14,
21 along with two other district courts – have concluded that LMRDA rights can constitute

1 extortable property under the Hobbs Act, notwithstanding the fact that LMRDA rights cannot be
2 legally exercised by third parties. *See United States v. Muscarella*, No. 03 CR. 229, 2004 WL
3 2186561, at * 6 (S.D.N.Y. Sept. 28, 2004); *United States v. Cacace*, No. 03 CR. 0072, 2004 WL
4 1646760 at * 2- *3 (E.D.N.Y. July 14, 2004). One district court, however, has reached a different
5 view, concluding in a pair of cases that intangible property rights can qualify as extortable
6 property under the Hobbs Act, but only if they can be lawfully exercised, transferred, or sold, and
7 that LMRDA rights therefore do not qualify. *See United States v. Bellomo*, 263 F. Supp. 2d 561,
8 575-576 (E.D.N.Y. 2003); *United States v. Coffey*, 361 F. Supp. 2d 102, 108-109 (E.D.N.Y.
9 2005).

10 We agree with the majority of district courts that have concluded that intangible property
11 can qualify as extortable property under the Hobbs Act regardless of whether its exercise,
12 transfer, or sale would be legal. The Supreme Court did not include a “legality” limitation in
13 *Scheidler II*. Moreover, as the government points out, the *Bellomo/Coffey* approach adopted by
14 one district court gives rise to the untenable implication that one can never “extort,” under the
15 Hobbs Act, illegal property (such as narcotics) because such property cannot be legally used,
16 sold, or transferred. In *Bellomo*, the district court tried to distinguish this argument by stating
17 that “[t]he victim’s grievance in that hypothetical would surely not be the loss of his right to
18 distribute drugs, but what the extortionist has obtained from him, the drugs.” *Bellomo*, 263 F.
19 Supp. 2d at 576. It is, however, as illegal to possess tangible drugs as it is to exercise the
20 intangible “right to distribute drugs.” The *Bellomo* court thus seems to suggest that its “legality”
21 gloss on *Scheidler II* only applies to intangible property. We see no basis in principle, policy, or

1 the text of *Scheidler II*, however, for holding that tangible property is “obtainable” regardless of
2 whether its use, transfer, or sale is legal, but that intangible property is “obtainable” only if its
3 exercise, transfer, or sale is legal. Nor do we see any basis for imposing a “legality” requirement
4 on the extortion of both tangible and intangible property. Accordingly, we hold that the ILA-
5 related and Local 1-related Hobbs Act extortion counts all survived *Scheidler II*.

6 ii. *The MILA Counts*

7 Similarly, as to the MILA-related extortion counts, the indictment alleges that the
8 defendants sought to obtain, and did obtain, the MILA participants’ and beneficiaries’ rights to
9 have the MILA trustees contract with the service provider of prescription drugs of the trustees’
10 choice, and to have MILA trustees and fiduciaries discharge their duties in MILA’s best interest.
11 The indictment further asserts that the defendants sought to exercise these rights for themselves
12 by telling the MILA trustees which service provider to support, and thereby ensuring the
13 selection of a Gambino-associated enterprise (GPP/VIP) that would pay kickbacks. Here, too,
14 the allegation is that the defendants exercised the rights in question in order to profit themselves.
15 Thus, the MILA-related Hobbs Act extortion counts satisfy the dictates of *Scheidler II*.

16 iii. *The Tommy Ragucci Counts*

17 As to the Tommy Ragucci Counts, the relevant portion of the indictment alleges that the
18 defendants attempted to obtain “money and the right of John Doe 1 [Tommy Ragucci] to be an
19 employee of Howland Hook Container Terminal.” Indictment ¶¶ 169, 171. In its brief, the
20 government similarly characterizes the extorted property from Tommy Ragucci as his “salary and
21 right to be employed at Howland Hook.” We note that while Tommy Ragucci was presumably

1 an at-will employee with no guaranteed right to continued employment at Howland Hook, he
2 surely had the right to be employed there for as long as he sought the job and his employer would
3 have him. The defendants unquestionably sought to deprive him of that right, and of its attendant
4 salary, when they ordered him to quit. The defendants also sought to take affirmative steps with
5 respect to those rights of employment and salary, insofar as their ultimate goal was to transfer
6 those rights to their own preferred candidate. Thus, for the same reason that we believe *Tropiano*
7 survives *Scheidler II*, we conclude that the Tommy Ragucci Counts similarly survive: in both
8 cases, the defendants tried to force their victim to relinquish a property right so that they could
9 transfer that right either to themselves (as in *Tropiano*) or to a third party of their choice (as in
10 the Tommy Ragucci Counts).

11 iv. *The Alayev Counts*

12 The Alayev Counts also state a claim for Hobbs Act extortion under our interpretation of
13 *Scheidler II*. Here, in relevant part, the indictment alleges that the defendants obtained Alayev's
14 intangible property rights to make various business decisions (such as whether to keep illegal
15 gambling machines on the premises) free from outside pressure. As the government aptly states
16 in its brief, "[t]he defendants did not seek merely to 'shut down' Alayev's business but
17 essentially made themselves his silent partners and exercised his rights to their own advantage."
18 Because here the allegation is that the defendants sought to exercise for themselves Alayev's
19 rights in a manner that would profit them, the Alayev Counts survive *Scheidler II*.

20 v. *The Seagal Counts*

21 Finally, the Seagal Counts also satisfy the *Scheidler II* standard. Here, it is alleged that

1 the defendants sought to exercise for themselves Seagal's right to make his own business
2 decisions, by threatening him with possible violence unless he worked with Jules Nasso again.
3 Thus, here the defendants sought to exercise for themselves Seagal's intangible right to decide
4 with whom to work, in order to secure profit for themselves. This constitutes Hobbs Act
5 extortion under *Scheidler II*.

6 b. The Jury Charge

7 We similarly conclude that the jury was properly instructed as to the elements of extortion
8 under the Hobbs Act.

9 The charge that the district court ultimately issued to the jury on March 5, 2003 (mere
10 days after *Scheidler II* was decided) was, in relevant part, as follows:

11 The term crime in the Hobbs Act includes not only money and other tangible
12 things of value but also includes any intangible right considered as a source or component
13 of income or wealth

14 [Y]ou should find the defendant guilty of extortion provided the government has
15 proven that as a consequence thereof the defendant obtained money or something else of
16 value from the victims that the defendant could exercise and transfer or sell.

17 In other words, merely interfering and depriving someone of property is
18 insufficient to constitute extortion. You have to be [sic] the obtaining of money or
19 something else of value from the victims that the defendant could exercise, transfer or sell
20 as well.

21 Tr. 4836, 4839.

22 In addition to setting forth that definition of "obtaining," the district court also defined the
23 relevant property implicated in each of the various extortion counts. For example, as to the ILA-
24 related extortion counts, the district court identified the property at issue as consisting

25 not only of union positions, money paid as wages and employee benefits and other
26 economic benefits, but also certain intangible rights of ILA members that are guaranteed
27 to them by the Labor Management Reporting Disclosure Act, which we refer to as the

1 LMRDA The LMRDA is a federal statute that guarantees and protects the rights of
2 employees who are members of labor organizations or unions. . . . The LMRDA
3 guarantees the rights of union members to fully and freely participate in the internal
4 affairs and governance of their union, to run for union office, if they choose, to assemble
5 and express their views and opinions about union affairs, to support and campaign on
6 behalf of candidates of their choice and to vote in union elections, all without being
7 subject to retaliation, threats or other punishment in the exercise of those rights. The
8 LMRDA also guarantees the right of union members to have their organization's money,
9 property and financial affairs of their labor organizations managed in accordance with the
10 loyal and responsible representation of the union's officers, agents, shop stewards and
11 other representatives solely for the benefit of the union and its members and not on behalf
12 of any party whose interests conflict with those of the union and its members.

13
14 Tr. 4837-38.

15
16 As to the MILA-related extortion counts, the district court identified the property at issue
17 as including

18 One, money and other economic benefits that MILA and its participants and
19 beneficiaries would have obtained but for the defendants' corrupt influence over MILA.

20 Two, the right of MILA and its participants and beneficiaries to have the MILA
21 trustees contract with the service provider of prescription pharmaceuticals of the trustees'
22 choice; and

23 Three, the right of MILA and its participants and beneficiaries to have the MILA's
24 trustees and fiduciaries discharge their duties with respect to MILA solely in the interest
25 of MILA and its participants and beneficiaries and not on behalf of a party whose
26 interests are adverse to the interests of MILA and its participants and beneficiaries. . . .
27 These latter rights are guaranteed by certain statutes, including the Employee Retirement
28 Income Security Act of 1974, which we call ERISA.

29
30 Tr. 4849-51.

31
32 On the Local 1-related extortion counts, the district court stated that they implicated the
33 same property interests as had been implicated by the ILA-related extortion counts. Tr. 4858.

34 As to the Tommy Ragucci Counts, the district court stated that the property at issue was
35 "the right of Tommy Ragucci to be an employee of Howland Hook Terminal." Tr. 4892.

36 As to the Alayev-related extortion counts, the district court stated that the property at

1 issue consisted of money or the right to conduct a business free from outside pressure, including
2 the right to refuse to keep the illegal gambling machines at a business and the right to sell the
3 business free from outside pressure.” Tr. 4894.

4 The district court added that, in regard to the rights to refuse to keep illegal gambling
5 machines at a business and to sell the business,

6 merely interfering with or depriving someone of those property rights is insufficient to
7 constitute extortion. More is required. Before you can find the defendant guilty of
8 extortion under these sub parts, you must find the government has proven that as a result
9 of wrongfully inducing the victim to part with the property right identified in those sub
10 parts, the defendant obtained money as [*sic*] something else of value from the victim that
11 the defendant could exercise, transfer or sell. So, in other words, it is not enough just to
12 discourage somebody or coerce somebody from not selling his business, you have to get
13 something because of that type of activity.

14
15 Tr. 4895-96.

16 Finally, as to the Seagal-related extortion counts, the district court stated that the property
17 at issue was “money and the right to make business decisions free from outside pressure.” Tr.
18 4897.

19 We believe that the district court’s charge to the jury as to each of these counts was
20 generally consistent with *Scheidler II* and with the analysis that we have set forth above. The
21 defendants-appellants argue that the district court’s charge was erroneous because, at several
22 times during the lengthy charge, it “called . . . to mind” concepts “inconsistent with the
23 *Scheidler* holding,” such as coercion. In particular, they point out that when discussing the ILA-
24 related counts, the district court stated that “I further instruct you that you may find that a
25 defendant induced labor union members to surrender property by the wrongful, actual or
26 threatened use of force, violence or fear if the defendant threatened or coerced such members or

1 their agents or representatives against their will in a manner that caused the members to refrain
2 from exercising their rights under the LMRDA.” Tr. 4838-39. The defendants-appellants
3 neglect to mention, however, that in the very next sentence, the district court went on to state that
4 “if you do so find, then you should find the defendant guilty of extortion *provided the*
5 *government has proven that as a consequence thereof the defendant obtained money or*
6 *something else of value from the victims that the defendant could exercise and transfer or sell.”*
7 Tr. 4839 (emphasis added). Thus, the district court clearly and expressly tied its instruction on
8 the ILA extortion counts back to the *Scheidler II* standard.

9 Similarly, the defendants-appellants point out that when charging the jury on the MILA-
10 related extortion counts, the district court told the jurors that “if you conclude that the
11 government has proven that a defendant used such coercion to induce a MILA trustee or another
12 person who exercised discretionary authority or control in regard to MILA’s assets in the
13 transaction to select Vincent Nasso’s firm as a service provider without regard to the interest of
14 the plan’s participants and beneficiaries, but, rather, in the interest of Vincent Nasso and others
15 acting on his behalf, then you may find such defendant wrongfully induced the obtaining of
16 intangible rights of the MILA participants and beneficiaries.” Tr. 4854. The defendants-
17 appellants suggest that this language “practically told the jury to find on the basis of coercion
18 rather than obtaining property by extortion.” This characterization is simply incorrect. Contrary
19 to the defendants-appellants’ assertion, here the district court was instructing the jurors that to
20 find that the defendants had wrongfully obtained the intangible rights of the MILA participants
21 and beneficiaries, they had to find not only that the defendants had caused the relinquishing of

1 these rights, but that the defendants had exercised those rights for themselves, *i.e.*, by ensuring
2 the selection of Gambino associate Vincent Nasso’s company, GPP/VIP, as a service provider.
3 Even this excerpted portion was, therefore, entirely consistent with the *Scheidler II* standard. It is
4 also worth noting that a mere two sentences before this MILA-specific discussion, the district
5 court had expressly reiterated that “merely interfering with or depriving someone of property is
6 insufficient to constitute extortion. You need the other branch of this, that the defendants
7 obtained money or something else of value from the victims that the defendants could exercise,
8 transfer, or sell.” Tr. 4853-54.

9 In short, the record makes clear that the district court consistently emphasized to the jury
10 – both as a general matter and in its discussion of the particular extortion counts – the
11 “obtaining” requirement as set forth in *Scheidler II*. And where a jury is repeatedly and correctly
12 instructed, in the language of the controlling Supreme Court decision, on the elements required
13 for conviction, a defendant cannot claim prejudicial error. *See United States v. Coyne*, 4 F.3d
14 100, 114 (2d Cir. 1993). We therefore reject all of the defendants-appellants’ *Scheidler II*-based
15 challenges to their extortion convictions.

16 **B. The Defendants-Appellants’ Sufficiency of the Evidence Challenges**

17 The defendants-appellants also raise various challenges to the sufficiency of the evidence
18 supporting their convictions of the Local 1 Counts, the Local 1814 Counts, the Howland Hook
19 Counts, the Molfetta Counts, the Money Laundering Counts, the Tommy Ragucci Counts, the
20 Zinna Count, the Marinelli Counts, the Alayev Counts, the Seagal Counts, the Gambling Counts,
21 and the Witness Tampering Count. We discuss each of these challenges below. As an initial
22

1 matter, we note that the same standard of review applies to all of these challenges: the
2 defendants-appellants are subject to the “heavy burden” of demonstrating that no jury could have
3 found guilt beyond a reasonable doubt based on the reasonably drawn inferences from the
4 evidence, which this Court views in the light most favorable to the government. *See, e.g., United*
5 *States v. Locascio*, 6 F.3d 924, 944 (2d Cir. 1993). We also note that, to the extent that one
6 defendant-appellant asserts a sufficiency-of-the evidence argument that is also relevant to the
7 case of another defendant-appellant, we assume that the other defendant-appellant joins in that
8 argument, given that each of them have so indicated in their submissions to this Court.

9 **1. The Local 1 Counts [Ciccone, Bondi]**

10 As described in detail above, the Local 1 counts rested on the argument that the
11 defendants, including defendants-appellants Ciccone and Bondi, had attempted, schemed, and
12 conspired to exercise control over Local 1 officials Saccenti and Knott. On appeal, both Ciccone
13 and Bondi argue that there was insufficient evidence to support their fraud convictions as to
14 Local 1, and Bondi also argues that there was insufficient evidence to support his conviction for
15 extortion of Local 1. We first analyze whether there was sufficient evidence on the Local 1 fraud
16 counts, and then move to an assessment of the Local 1 extortion counts.

17 a. The Local 1 Fraud Counts

18 It is undisputed that the Local 1 fraud counts – which alleged a conspiracy and scheme to
19 defraud Local 1 – sounded in an “honest services wire fraud” theory. As this Court has
20 previously explained, the general elements of wire fraud under 18 U.S.C. § 1343 are (1) a scheme
21 to defraud; (2) money or property as the object of the scheme; and (3) use of the wires to further

1 the scheme. *Fountain v. United States*, 357 F.3d 250, 255 (2d Cir. 2004). The specific type of
2 wire fraud at issue here – “honest services wire fraud” – arises under 18 U.S.C. § 1346, which
3 this Circuit has interpreted to “clearly prohibit[] a scheme or artifice to use the mails or wires to
4 enable an officer or employee of a private entity (or a person in a relationship that gives rise to a
5 duty of loyalty comparable to that owed by employees to employers) purporting to act for and in
6 the interests of his or her employer (or of the person to whom the duty of loyalty is owed)
7 secretly to act in his or her or the defendant’s own interests instead, accompanied by a material
8 misrepresentation made or omission of information disclosed to the employer.” *United States v.*
9 *Rybicki*, 354 F.3d 124, 126-27 (2d Cir. 2003) (en banc); *see also id.* at 147 (stating that a
10 conviction requires a showing of “(1) a scheme or artifice to defraud; (2) for the purpose of
11 depriving another of the intangible right of honest services . . . ; (3) where the misrepresentations
12 (or omissions) made by the defendants are material in that they have the natural tendency to
13 influence or are capable of influencing the employer to change its behavior; and (4) use of the
14 mails or wires in furtherance of the scheme”); 18 U.S.C. § 1346.

15 Here, the essence of the government’s “honest services wire fraud” theory as to the Local
16 1 Counts was that the defendants schemed to defraud Local 1 union members of the honest
17 services of two of their elected officials – Louis Saccenti and Steve Knott – by getting these
18 officials to secretly act at the behest of the Gambino Family. In his appeal, Ciccone has not
19 disputed that there was sufficient evidence demonstrating that he attempted to exercise control
20 over the decisions of Saccenti and Knott. Rather, Ciccone argues that there is no evidence that
21 Saccenti or Knott ever actually *acceded* to this coercion, and that the Local 1 members were

1 therefore ultimately defrauded of nothing.

2 As the government points out, however, this Circuit has held that in wire fraud cases, it is
3 the scheme itself, rather than its success, that is the required element for conviction. *United*
4 *States v. Trapilo*, 130 F.3d 547, 552 (2d Cir. 1997). Ciccone has responded to this argument by
5 attempting an analogy between the instant case and this Circuit’s holding in *Rybicki* (an honest
6 services wire fraud case) that

7 private-sector honest services cases fall into two general groups, cases involving bribes or
8 kickbacks, and cases involving self-dealing. . . .In bribery or kickback cases, the
9 undisclosed bribery itself is sufficient to make out the crime, but in self-dealing cases, the
10 existence of a conflict of interest alone is not sufficient to do so. . . .In the self-dealing
11 context, though not in the bribery context, the defendant’s behavior must thus cause, or at
12 least be capable of causing, some detriment – perhaps some economic or pecuniary
13 detriment – to the employer.

14 *Rybicki*, 354 F.3d at 139-141. Essentially, Ciccone suggests that this case is analogous to a
15 “self-dealing” case, and that because no detriment to Local 1 actually occurred here, no liability
16 can attach to the scheme. This argument fails for two reasons. First, we do not believe that an
17 analogy can properly be drawn between a self-dealing case in the private sector and the conduct
18 alleged here, *i.e.*, attempts to coerce union officials into shifting their loyalty from their union
19 members to organized crime. Indeed, *Rybicki* stated that “[c]ases involving union officials tend
20 to fit the pattern of the private-sector bribery cases” (in which case no showing of detriment is
21 required) and that in any event, “[b]ecause federal law imposes special duties of loyalty on union
22 officials, analysis of such cases may depart from analysis of other private sector cases.” *Rybicki*,
23 354 F.3d at 140 & n.14. Second, even assuming *arguendo* that this analogy could somehow
24 stand, it is clear that the defendants’ commission of this conduct was at least *capable* of causing

1 some detriment (economic and otherwise) to the Local 1 members, which is all that *Rybicki*
2 requires. We therefore reject Ciccone’s challenge to the sufficiency of the evidence supporting
3 his conviction of the Local 1 fraud counts.

4 Bondi, meanwhile, raises an additional challenge: he alleges that there was no evidence
5 that he personally ever had any contact with Local 1 official Louis Saccenti, and that he simply
6 happened to be present – by coincidence – when Cassarino visited Saccenti’s house with the
7 purpose of telling Saccenti to stop his resistance. Construing the facts in the light most favorable
8 to the government, however, we believe that there was sufficient evidence to conclude that when,
9 after Ciccone instructed Cassarino to take Bondi with him to tell Saccenti that he “better stop it .
10 . . otherwise, you know what’s going to happen here?” and Bondi proceeded to accompany
11 Cassarino to Saccenti’s home, *see supra* p. [15], Bondi did so as a participant in the criminal
12 scheme. *See, e.g., Locascio*, 6 F.3d at 944 (stating that although “[t]raditionally, conspiracy law
13 has required more than ‘mere presence’ or mere knowledge to sustain a conviction for
14 conspiracy[,] . . . [t]here is a distinction between ‘mere presence’ and ‘presence under a particular
15 set of circumstances’ that indicate participation,” and that “presence coupled with other signs of
16 involvement will be enough to sustain a conviction”). We therefore reject Bondi’s challenge to
17 the sufficiency of the evidence supporting his conviction of the Local 1 fraud counts.

18 b. The Local 1 Extortion Counts

19 Bondi challenges his conviction of the Local 1 extortion counts on the same basis that he
20 challenged his conviction of the Local 1 fraud counts: he suggests that it was mere coincidence
21 that he was present when Cassarino went over to Saccenti’s house in order to tell him to stop his

1 resistance. For the reasons set forth above, we reject this argument and thus affirm his
2 conviction of these counts.

3 **2. The Local 1814 Counts [Ciccone]**

4 The Local 1814 counts, as described in detail above, rested on the theory that Ciccone
5 and other defendants had exercised control over the actions of Local 1814 President Scollo,
6 thereby extorting and defrauding Local 1814 and its members. In his brief, Ciccone does not
7 dispute that he exercised control over Scollo, but argues that Scollo's ultimate actions were
8 consistent with the interests of Local 1814. He points out, for instance, that Scollo testified that
9 he himself wanted to terminate Scala, and that Ciccone permitted him to do so.

10 As the government argues, however, the harm caused to Local 1814 was that Scollo
11 generally had to seek Ciccone's permission before taking any significant action, and that the
12 Local 1814 members were therefore deprived of Scollo's honest services. We agree. The Local
13 1814 members had the right to have Scollo – their elected representative – independently make
14 the decisions that he wanted to make, according to the timetable that he thought appropriate.
15 Because of Ciccone's control over Scollo, this was not possible. For instance, during the trial,
16 when Scollo was asked whether he had felt that he had the authority to terminate Phil Scala, he
17 answered "not really." Tr. 1449. He explained that he had to wait until "Sonny" [Ciccone] said
18 "if you want to get rid of him, get rid of him," because "Sonny always told us when it's the big
19 decisions that we should have to confer with him first." Tr. 1450. By ordering Scollo to "confer
20 with him" on the "big decisions," Ciccone defrauded the Local 1814 members of Scollo's honest
21 services. That Ciccone often ultimately permitted Scollo to follow through on his proposed

1 course of action is irrelevant. We therefore reject Ciccone’s challenge to his conviction of the
2 Local 1814 counts.

3 **3. The Howland Hook Counts**

4 As set forth in detail above, the gravamen of the Howland Hook Counts was that
5 Ciccone, along with other defendants, had extorted quarterly cash payments from Carmine
6 Ragucci, the then-owner of Howland Hook, for a period of multiple years. On appeal, Ciccone
7 apparently concedes that these cash payments were made, but states that there was insufficient
8 evidence as to what these payments were for or why they were made, stressing that Carmine
9 Ragucci himself never testified.

10 As discussed above, extortion is defined in the Hobbs Act as “the obtaining of property
11 from another, with his consent, induced by the wrongful use of actual or threatened force,
12 violence, or *fear*.” 18 U.S.C. § 1951(b)(2) (emphasis added). This Circuit has stated that “[t]he
13 statute does not limit the definition of extortion to those circumstances in which property is
14 obtained through the wrongful use of fear created by implicit or explicit threats, but instead
15 leaves open the cause of the fear,” and we have indicated that the required showing is that the
16 “defendant must knowingly and willfully create or instill fear, or use or exploit existing fear with
17 the specific purpose of inducing another to part with his or her property.” *United States v.*
18 *Abelis*, 146 F.3d 73, 83 (2d Cir. 1998) (internal quotation marks omitted).

19 Here, we believe that given the evidence described above, a reasonable jury could have
20 concluded that Ciccone obtained these cash payments from Carmine Ragucci by exploiting
21 Ragucci’s fear of Ciccone, particularly given Scollo’s testimony that Ciccone would be “pissed

1 off” when the payments were late, and that Scollo would then communicate that displeasure to
2 Ragucci. It is true that Ragucci did not himself testify, but there is no dispute that Ragucci made
3 sizeable cash payments to Ciccone on a scheduled basis, no dispute that Ragucci would be told
4 that Ciccone was “pissed off” when the payments were late, and no affirmative evidence
5 whatsoever that these payments were for a legitimate purpose, such as repayment of a loan or
6 payment for services rendered. Indeed, Ragucci’s brother, Tommy – who worked with him at
7 Howland Hook – specifically testified that he did not know of any legitimate basis for these
8 payments. Scollo’s testimony about the highly surreptitious nature of the transmission of the
9 money, and the fact that he knew his involvement in it was “not the proper thing to do,” further
10 supports the conclusion that these payments were the result of extortion. Although Ciccone has
11 posited on appeal various other reasons for why these payments were made, no evidence
12 supporting such reasons was presented to the jury, and we cannot say that, construing all facts in
13 the light most favorable to the government, a reasonable jury would have been unable to
14 conclude that these payments were the result of extortion. We therefore reject Ciccone’s
15 challenge to his conviction of the Howland Hook Counts.

16 **4. The Molfetta Counts**

17 The Molfetta Counts, in turn, rested on the theory that Ciccone had extorted cash
18 payments from Frank Molfetta, the owner of the Bridgeside Drayadge trucking company. In his
19 brief, Ciccone acknowledges receiving cash payments from Molfetta, but argues that he
20 “liberated Molfetta from [the] obligation” to pay Carmine Ragucci and that this was therefore not
21 a case of extortion. This argument fails to persuade us that a reasonable jury could not have

1 concluded that the payments were the result of extortion, for two reasons. First, Ciccone has
2 never addressed the uncontradicted evidence that Molfetta had already concluded at least three
3 years earlier that he was no longer obligated to pay Carmine Ragucci. This evidence, of course,
4 seriously undermines Ciccone's claim that he somehow freed Molfetta from that obligation.
5 Second, in his grand jury testimony, Molfetta himself stated that Ciccone had ordered him to start
6 making monthly payments (retroactive to the prior month), and that he had made those payments
7 out of fear, adding, "I'm afraid right now." *See supra* p. [18]. Ciccone acknowledges the
8 admissibility of Molfetta's grand jury testimony as a prior inconsistent statement, but states that
9 "even crediting this, there was no proof that Ciccone affirmatively exploited any such fear." In
10 so arguing, Ciccone fails to confront the actual substance of Molfetta's testimony, which
11 certainly provided sufficient evidence upon which a jury could conclude that he made the
12 payments in question out of fear. We therefore reject Ciccone's challenge to the sufficiency of
13 the evidence supporting his conviction of the Molfetta Counts.

14 **5. The Money Laundering Counts [Peter Gotti, Richard G. Gotti, Ciccone]**

15 Peter Gotti, Richard G. Gotti, and Ciccone were convicted of (1) money laundering
16 conspiracy in violation of 18 U.S.C. § 1956(h) and (2) numerous acts of money laundering in
17 violation of either 18 U.S.C. § 1956(a)(1)(A)(i) ("promotion money laundering") and 18 U.S.C. §
18 1956(a)(1)(B)(i) ("concealment money laundering"). As set forth in detail above, the money
19 laundering charges essentially implicated the payment of cash "tributes" from the proceeds of
20 illegal activities up the Gambino Family chain to Peter Gotti, as acting boss. (Ciccone, as
21 described *supra*, both received moneys and paid a portion of those moneys up the chain to Peter

1 Gotti.)

2 On appeal, the defendants-appellants make several arguments stemming from the
3 statutory text of 18 U.S.C. § 1956.¹⁰ We therefore begin with the relevant statutory language,
4 which provides that

5 (1) Whoever, knowing that the property involved in a financial transaction represents the
6 proceeds of some form of unlawful activity, conducts or attempts to conduct such a
7 financial transaction which in fact involves the proceeds of specified unlawful activity—
8 (A) (i) with the intent to promote the carrying on of specified unlawful activity; or
9 . . .
10 (B) knowing that the transaction is designed in whole or in part—
11 (i) to conceal or disguise the nature, the location, the source, the ownership,
12 or the control of the proceeds of specified unlawful activity . . .
13 shall be sentenced to a fine of not more than \$500,000 or twice the value of the property
14 involved in the transaction, whichever is greater, or imprisonment for not more than
15 twenty years, or both.

16
17 18 U.S.C. § 1956(a). The money laundering conspiracy provision, in turn, simply makes it a
18 crime to conspire to commit the above acts. *See* 18 U.S.C. § 1956(h) (“Any person who
19 conspires to commit any offense defined in this section . . . shall be subject to the same penalties
20 as those prescribed for the offense the commission of which was the object of the conspiracy.”).

21 Thus, the money laundering charges against Peter Gotti, Richard G. Gotti, and Ciccone
22 required the government to prove that the defendants, (1) knowing that the property involved in a
23 financial transaction represented the proceeds of some form of unlawful activity, (2) conducted
24 or attempted to conduct a financial transaction (3) which in fact involved the proceeds of that

¹⁰These arguments can be found in the briefs of both Peter Gotti and Ciccone. We assume that each joins in the other’s arguments as relevant, and that Richard G. Gotti (who did not submit a separate brief) joins in all arguments relevant to him. We therefore refer to these arguments as being advanced by the “defendants-appellants,” regardless of in whose brief they can be found.

1 unlawful activity, (4) either (a) with the intent to promote the carrying on of that unlawful
2 activity or (b) with the knowledge that the transaction was designed at least in part to conceal or
3 disguise the nature, location, source, ownership, or control of the proceeds of the unlawful
4 activity.

5 The defendants-appellants argue that prongs two, three, and four were not met. We
6 address each of these arguments in turn.

7 a. Prong 2: Conducting a Financial Transaction

8 To evaluate the contention that there was insufficient evidence to show that the
9 defendants-appellants conducted a financial transaction, we must first look to the statutory
10 definitions of “conduct,” “transaction,” and “financial transaction.”

11 Under 18 U.S.C. § 1956(c)(2), the term “conducts” is defined as “includ[ing] initiating,
12 concluding, or participating in initiating, or concluding a transaction.”

13 Under 18 U.S.C. § 1956(c)(3), the term “transaction” is defined as including

14 a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with
15 respect to a financial institution includes a deposit, withdrawal, transfer between
16 accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock,
17 bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or
18 any other payment, transfer, or delivery, by, through, or to a financial institution, by
19 whatever means effected.

20
21 Finally, under 18 U.S.C. § 1956(c)(4), a “financial transaction” is defined as:

22 (A) a transaction which in any way or degree affects interstate or foreign commerce (i)
23 involving the movement of funds by wire or other means or (ii) involving one or more
24 monetary instruments, or (iii) involving the transfer of title to any real property, vehicle,
25 vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is
26 engaged in, or the activities of which affect, interstate or foreign commerce in any way or
27 degree.

1 The defendants-appellants advance two arguments as to why the “conducting a financial
2 transaction” prong was not met, both of which are primarily legal in nature. First, they argue that
3 there was insufficient evidence to conclude that they conducted any transactions. Second, they
4 argue that there was insufficient evidence to conclude that the alleged transactions they
5 conducted were *financial*, *i.e.*, that the transactions “in any way or degree affect[ed] interstate or
6 foreign commerce.”

7 The defendants-appellants’ first argument, advanced principally by Peter Gotti, is that at
8 most, the government demonstrated the *receipt* of moneys, and that merely receiving funds
9 cannot rise to the level of conducting a transaction. The statutory text, however, indicates the
10 mere receipt of funds *does* constitute the conducting of a transaction pursuant to 18 U.S.C. §
11 1956(c)(2)-(3), under which (1) the term “conducts” includes participating in the conclusion of a
12 transaction and (2) the term “transaction” includes transfers and deliveries. In other words, when
13 a person accepts a transfer or delivery of funds, he has participated in the conclusion of that
14 transfer or delivery, and has therefore conducted a transaction. This interpretation is also
15 consistent with the indication in the legislative history that Congress intended the term
16 “transaction” to be interpreted broadly. *See, e.g., United States v. Leslie*, 103 F.3d 1093, 1101-02
17 (2d Cir. 1997) (noting, with reference to the Senate Report, that “Congress intended the term
18 ‘transaction’ to be interpreted broadly”). Indeed, the Sixth Circuit, sitting *en banc*, has
19 specifically concluded that the delivery or transfer of cash to another person is a financial
20 transaction, explaining that although the “mere transportation of cash” does not meet the
21 definition of a financial transaction, the “purchase, sale, transfer, delivery, etc.” of cash do

1 qualify as transactions, because they constitute “some disposition of funds.” *See United States v.*
2 *Reed*, 77 F.3d 139, 142-43 (6th Cir. 1996) (en banc). We agree, and therefore reject the
3 defendants-appellants’ argument that the receipt of funds does not constitute a transaction.

4 We similarly reject the defendants-appellants’ second argument: that the transactions in
5 question were not “financial” because they did not affect interstate or foreign commerce. Our
6 Circuit has stated that in the context of money laundering prosecutions under 18 U.S.C. § 1956,
7 the only required showing is that “the individual subject transaction has, at least, a *de minimis*
8 effect on interstate commerce.” *Leslie*, 103 F.3d at 1100. We have explained that

9 [t]he interstate commerce element of the money laundering statute, while an essential
10 element, is jurisdictional in nature. The requirement that the transaction or financial
11 institution affect interstate commerce means that *proof of a minimal effect* on interstate
12 commerce is needed to support federal jurisdiction. The statute’s requirement that the
13 questioned activity ‘affect commerce’ in ‘any way or degree’ signals Congress’s desire to
14 exercise the full extent of its Commerce Clause power. Hence, the government’s burden
15 is not heavy.

16
17 *Id.* at 1101 (internal citations and quotation marks omitted) (emphasis added). Although the
18 defendants-appellants argue that the mere receipt of moneys cannot affect interstate commerce,
19 and that it is inappropriate to look at the conduct that gave rise to the money in the first place, we
20 have held, since *Leslie*, that it is indeed permissible to consider the conduct that gave rise to the
21 laundered funds. *See, e.g., United States v. Goodwin*, 141 F.3d 394, 402 (2d Cir. 1997) (stating
22 that laundering of narcotics proceeds met the jurisdictional requirement because “narcotics
23 trafficking and money laundering are activities which, in the aggregate, will undoubtedly affect
24 interstate commerce”) (internal citations omitted); *see also United States v. Hatcher*, 323 F.3d
25 666, 672 (8th Cir. 2003) (holding that the money laundering counts were linked to interstate

1 commerce because they stemmed from a purchase of stolen jewelry, and the robbery of that
2 jewelry had affected interstate commerce).

3 This interpretation, in turn, makes clear that the money laundering offenses charged in
4 this case affected both interstate and foreign commerce. The moneys in question were alleged to
5 be the proceeds of the Hobbs Act extortions and other illegal activities discussed in detail above.
6 The alleged extortion victims were businesses and unions that engaged in interstate commerce,
7 and the gambling operations (in which the defendants allegedly operated the New York branch of
8 a Costa Rican bookmaking enterprise) were international in scope. As such, these criminal
9 activities affected interstate and foreign commerce, and the laundering of their proceeds also
10 affected interstate commerce by promoting the activities that gave rise to them. Moreover, as the
11 government also notes, the alleged money laundering activity (which resulted in the payment of
12 “tributes” up to Gambino Family leaders such as Gotti and Ciccone) also affected interstate
13 commerce insofar as it promoted the Gambino Family’s operation – which clearly affects
14 interstate commerce – as a whole.

15 We believe that these factors collectively demonstrate that the money laundering had at
16 least the minimal effect on interstate commerce necessary to satisfy the jurisdictional
17 requirement, and we therefore reject the defendants-appellants’ argument that there was
18 insufficient evidence to find that they conducted financial transactions within the meaning of 28
19 U.S.C. § 1956.

20 b. Prong 3: Proceeds of Unlawful Activity

21 The defendants-appellants next argue that even assuming *arguendo* that the receipt of the

1 moneys in question constituted a financial transaction, there was insufficient evidence to
2 conclude that these moneys represented the proceeds of a specified unlawful activity. In contrast
3 to the essentially legal nature of the prong two analysis, the defendants-appellants' argument as
4 to this prong requires a more fact-specific inquiry.

5 The gravamen of the defendants-appellants' contentions here is that the government did
6 not sufficiently link the moneys in question to specified unlawful activities, but simply argued
7 that the proceeds came from various possible unlawful sources. Under our Circuit's precedent,
8 the government is required to link the moneys in question to specified unlawful activities, but
9 this link can be made through circumstantial evidence. *See United States v. Reiss*, 186 F.3d 149,
10 152-153 (2d Cir. 1999) (concluding that various pieces of evidence gave rise to the inference that
11 the laundered funds in question were drug proceeds).

12 Here, we conclude that the government adduced evidence sufficient to prove that the
13 moneys in question derived from Hobbs Act extortions and illegal gambling businesses. Indeed,
14 as set forth in detail above, the government presented evidence indicating that these moneys
15 came from, *inter alia*, the Molfetta extortion, the MILA kickbacks, and the joker-poker machines
16 that the Gambino Family placed in businesses including Café Roma. *See supra* pp. [21-23].

17 c. Prong 4: Intent of Promoting or Concealing the Unlawful Activity

18 Finally, the defendants-appellants argue that at most, the government has shown that cash
19 payments were made up to Peter Gotti, and that even if it could be shown that this money derived
20 from unlawful activities, his receipt of the money was separate from, and neither promoted nor
21 concealed, those activities. As noted above, either the promotion or the concealment prong is a

1 required element of a money laundering conviction.

2 Based on our review of the trial evidence, we believe that there was ample evidence upon
3 which a jury could conclude that the defendants-appellants participated in concealment money
4 laundering, *i.e.*, that they participated in a transaction (delivery of the cash) that was designed at
5 least in part to conceal the source of these moneys. As noted above, at trial the government
6 adduced evidence that the process by which the cash tributes were transmitted was highly
7 complex and surreptitious. For example, the defendants would communicate about the
8 transactions in coded language (*i.e.*, by referring to Peter Gotti as “him” or “the guy” rather than
9 by name); the money would be transmitted to Peter Gotti through several intermediaries; the
10 money would be transmitted in a surreptitious manner; and the payments were made in cash. *See*
11 *supra* pp. [21-24]. We therefore believe that a reasonable jury could infer that Peter Gotti
12 accepted the cash payments knowing that the deliveries of those payments had been designed in a
13 way that would conceal the source of the moneys.¹¹ *See, e.g., United States v. Prince*, 214 F.3d
14 740, 752 (6th Cir. 2000) (finding the concealment prong met by the elaborate arrangements for
15 transmitting the money in question, which protected the defendants from a paper trail); *United*
16 *States v. Cruzado-Laureano*, 404 F.3d 470, 483 (1st Cir. 2005) (stating that a conviction of
17 concealment money laundering requires “evidence of intent to disguise or conceal the
18 transaction, whether from direct evidence, like the defendant’s own statements, or from
19 *circumstantial evidence*, like the use of a third party to disguise the true owner, or *unusual*

¹¹Because only the concealment *or* the promotion prong must be met, we do not reach the separate question of whether the jury could have also concluded that Peter Gotti, Richard G. Gotti, and Ciccone engaged in “promotion money laundering.”

1 *secrecy*”) (emphasis added).

2 **6. The Tommy Ragucci Counts [Ciccone]**

3 Ciccone next challenges his conviction of the Tommy Ragucci Counts, which – as
4 described above – rest on the allegation that Ciccone conspired and attempted to force Tommy
5 Ragucci to resign from his job at Howland Hook, and thus to obtain the value of his right to
6 compete for that job. In challenging the sufficiency of the evidence supporting these convictions,
7 Ciccone argues that “[n]o evidence of any threat communicated to [Tommy] Ragucci was
8 elicited,” that at worst, Ciccone simply “made a determination or recommendation that [Tommy]
9 Ragucci should be replaced by Anastasia,” and that there is no evidence “of any affirmative
10 exploitation of [Tommy] Ragucci’s fear [of Ciccone] much less that Ciccone was aware of it.”

11 These arguments, however, are directly contradicted by the wiretapped conversation
12 between Ciccone and Scollo as to Tommy Ragucci, in which Ciccone instructed Scollo: “Tell
13 him I don’t want him there. Tell him I don’t want him there.” *See supra* p. [26]. They are also
14 squarely contradicted by Tommy Ragucci’s own testimony that Scollo told him that Ciccone
15 wanted him to step down, which caused him to feel intimidated. *See id.* We therefore believe
16 that there was ample evidence upon which a jury could conclude that Ciccone attempted to extort
17 the economic value of Tommy Ragucci’s right to compete for his position at Howland Hook.

18 _____ **7. The Zinna Count [Ciccone]**

19 The Zinna Count, as set forth above, rests on the allegation that Ciccone schemed with
20 other defendants to demand \$5,000 in cash from Zinna. In challenging the sufficiency of the
21 evidence supporting his conviction on this count, Ciccone principally argues that there is no

1 proof that Zinna was ever actually asked for this money. This argument fails to appreciate that
2 the Zinna Count did not charge Ciccone with extortion itself, but with *conspiracy* to extort. The
3 evidence described above is certainly sufficient to support a fact-finder's conclusion that Ciccone
4 schemed with Cassarino and Scollo to extort property from Zinna, in violation of the Hobbs Act.
5 *See supra* p. [27]; *see also United States v. Clemente*, 22 F.3d 477, 480 (2d Cir. 1994) ("In order
6 to establish a Hobbs Act conspiracy, the government does not have to prove any overt act
7 The government needs to prove only that an agreement to commit extortion existed, not that
8 extortion was actually committed."). Ciccone also argues that there is no evidence that Scollo
9 and Cassarino actually agreed to carry out his orders to extort the money from Zinna. In the
10 conversation between Ciccone, Scollo, and Cassarino, however, the three men discussed Zinna's
11 activities with shared disapproval, and expressed no hesitation about carrying out Ciccone's
12 orders to extort him. We therefore reject Ciccone's challenges to this conviction.

13 **8. The Marinelli Counts [Ciccone]**

14
15 The gravamen of the Marinelli Counts, as described above, was that after Marinelli
16 enlisted the help of Ciccone and Cassarino in obtaining his workers' compensation payments,
17 they extorted a portion of the proceeds from him. In challenging the sufficiency of the evidence
18 supporting his conviction of these counts, Ciccone argues that there was no evidence that
19 Marinelli paid Ciccone and Cassarino out of fear, noting that Marinelli was the one who initially
20 contacted Ciccone and Cassarino for the help in question. This argument does not respond,
21 however, to the evidence that once Marinelli *did* contact Ciccone and Cassarino (and later
22 received his payment), Ciccone and Cassarino demanded a portion of the proceeds and then

1 instructed Marinelli's son, Vito, that the initial \$5,000 payment was insufficient. *See supra* p.
2 [28]. It seems clear that a reasonable factfinder could conclude that at this point, Marinelli's
3 decision to pay them another \$5,000 was prompted by fear. Indeed, Marinelli's son, Vito,
4 specifically testified at trial about his fear of not paying enough. *See id.* We therefore reject
5 Ciccone's argument that there was insufficient evidence supporting his conviction of this count.
6

7 **9. The Alayev Counts [Bondi]**¹²

8 The only sufficiency-of-the-evidence challenge to the Alayev Counts has been brought by
9 Bondi, who argues that he was not personally involved in the Eduard Alayev extortion. At trial,
10 however, the government adduced evidence sufficient to tie Bondi to the extortion. Specifically,
11 as noted above, Alayev testified that both Cassarino and Bondi came together to order him to
12 install gambling machines at Café Roma. *See supra* p. [28]. The government also introduced
13 wiretap evidence in which Bondi provided Cassarino with information about Alayev (whom they
14 referred to as "Eddie") and the goings-on at Café Roma. *See supra* p. [30]. Alayev also testified
15 at trial that Bondi was the person who would come to collect the money from the gambling
16 machines, and would sometimes give him some of the proceeds. *See supra* p. [29]. Based on
17 the above, we conclude that there was sufficient evidence for the jury to tie Bondi to the Alayev
18 extortion.

19 **10. The Seagal Counts [Ciccone]**

20 Ciccone next challenges the sufficiency of the evidence supporting his conviction of the

¹²Although Ciccone was also convicted of the Alayev counts, he has not challenged on appeal the sufficiency of the evidence supporting these counts. Since all of Bondi's arguments as to the Alayev Counts are specific to him, we assume that Ciccone does not join in them.

1 Seagal Counts, which essentially alleged that he had attempted to force Seagal to work with Jules
2 Nasso. On appeal, Ciccone acknowledges that Seagal was subjected to fear by other Gambino
3 Family associates, but asserts that he had no involvement in these interactions. The evidence
4 adduced at trial, however, plainly supported a finding that Ciccone himself was involved in
5 exploiting Seagal’s fear of him in order to get him to work with Jules Nasso. Indeed, Seagal
6 testified to numerous instances in which Ciccone interacted with him in a threatening manner
7 while telling him to resume his business relationship with Jules Nasso and to pay the defendants
8 significant sums of money. *See supra* pp. [31-32]. The wiretap evidence also indicated that
9 Ciccone was directly involved in the pressure brought to bear on Seagal. *See supra* p. [33].
10 Accordingly, we reject this challenge.

11 **11. The Gambling Counts [Bondi]¹³**

12 Bondi (presumably joined by Ciccone) next argues that there was insufficient evidence to
13 support his gambling convictions for bookmaking and joker-poker under 18 U.S.C. § 1955. This
14 statute provides that “[w]hoever conducts, finances, manages, supervises, directs, or owns all or
15 part of an *illegal gambling business* shall be fined under this title or imprisoned not more than
16 five years, or both.” 18 U.S.C. § 1955(a) (emphasis added). An “illegal gambling business,” in
17 turn, is defined as one which

18 (i) is a violation of the law of a State . . . in which it is conducted; (ii) involves five or
19 more persons who conduct, finance, manage, supervise, direct, or own all or part of such
20 business; and (iii) has been or remains in substantially continuous operation for a period

¹³In his brief, Ciccone did not raise specific arguments as to the Gambling Counts, of which he was also convicted. We assume, however, that he joins in the arguments advanced by Bondi, because they are generally applicable rather than specific to Bondi.

1 in excess of thirty days or has a gross revenue of \$2,000 in any single day.
2
3 18 U.S.C. § 1955(b)(1).

4 Bondi argues that his convictions for bookmaking and joker-poker did not satisfy these
5 statutory requirements.

6 a. Bookmaking

7 With regard to the bookmaking count, Bondi essentially makes three arguments as to why
8 there was insufficient evidence to convict him of bookmaking. His first two arguments arise
9 from the 18 U.S.C. § 1955(b)(1)(i) requirement that the business must violate the law of the State
10 in which it was conducted. His third argument arises from the 18 U.S.C. § 1955(b)(1)(ii)
11 requirement that the business involve five or more persons who conduct, finance, manage,
12 supervise, direct, or own all or part of the business.

13 First, Bondi asserts that the bookmaking business was not a violation of New York law
14 (and therefore did not satisfy the requirements of 18 U.S.C. § 1955(b)(1)(i)) because Pelican
15 Sports was located offshore in Costa Rica, its actions were legal there, and no bets were received
16 or accepted in New York. At trial, however, the government adduced evidence sufficient to
17 conclude that the defendants, who were New York-based, had been operating a local branch of
18 the business, essentially managing a stable of clients who placed their bets from New York. *See*
19 *supra* pp. [34-36]. When bets are placed from New York, the gambling activity is illegal under
20 New York law, regardless of whether the activity is legal in the location to which the bets were
21 transmitted. *See, e.g., People ex rel. Vacco v. World Interactive Gambling Corp.*, 185 Misc. 2d
22 852, 859-60 (N.Y. Sup. 1999) (“[U]nder New York Penal Law, if the person engaged in

1 gambling is located in New York, then New York is the location where the gambling occurred
2 (*see* Penal Law § 225.00(2))¹⁴ It is irrelevant that Internet gambling is legal in Antigua. The
3 act of entering the bet and transmitting the information from New York via the Internet is
4 adequate to constitute gambling activity within New York State.”). New York Penal Law §
5 225.00(4) further provides that “[a] person ‘advances gambling activity’ when, acting other than
6 as a player, he engages in conduct which materially aids any form of gambling activity,” which
7 the defendants here did. Thus, the defendants violated New York law by organizing a
8 bookmaking operation through which bettors made their bets from New York.

9 Second, Bondi argues that the bookmaking business was not a violation of New York
10 state law because there was no evidence that the bookmaking business accepted bets in any one
11 day that totaled more than \$5,000. *See* N.Y. Penal Law § 225.10 (“A person is guilty of
12 promoting gambling in the first degree when he knowingly advances or profits from unlawful
13 gambling activity by (1) engaging in bookmaking activity to the extent that he receives or accepts
14 in any one day more than five bets totaling more than five thousand dollars. . . .”). The betting
15 records introduced into evidence at trial, however, indicated that the defendants’ New York
16 operation of Pelican Sports did take in more than five bets totaling more than \$5,000 on certain
17 days. *See, e.g.*, Gov’t Exh. 65.

18 Third, Bondi argues that the government did not satisfy the § 1955(b)(2) standard of

¹⁴N.Y. Penal Law § 225.00(2) defines “gambling” as follows: “A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.”

1 showing that at least five people were involved in the defendants' operation. At trial, however,
2 the government adduced evidence that in addition to Bondi, co-defendants Ciccone, Cassarino,
3 Brancato, Thomas Lisi, Jerome Orsino, and Carmine Malara were also involved in the
4 bookmaking operation.¹⁵ Thus, Bondi's arguments as to the sufficiency of the evidence on the
5 bookmaking charges lack merit.

6 b. Joker-Poker

7 Bondi also asserts that the elements of 18 U.S.C. § 1955 were not satisfied with respect to
8 the joker-poker charges, principally on grounds that the joker-poker machines in question were
9 not illegal gambling devices.

10 As noted above, 18 U.S.C. § 1955 makes illegal only those gambling businesses that are a
11 violation of the law of the state in which they are conducted. Under New York State law, an
12 illegal gambling device is a machine usable in the playing phases of any "gambling activity."
13 N.Y. Penal Law § 225.00(7). "Gambling," in turn, is defined as the staking or risking of
14 "*something of value* upon the outcome of a *contest of chance* . . . , upon an agreement or
15 understanding that [the individual] will receive something of value in the event of a certain
16 outcome." N.Y. Penal Law § 225.00(2) (emphasis added). "Something of value" is defined as
17 "any money or property, any token, object, or article exchangeable for money or property, or any

¹⁵Malara and Lisi pled guilty, and their pleas were admitted into evidence. Under *Crawford v. Washington*, 541 U.S. 36 (2004), which was decided after the trial, that admission was improper. At trial, however, the government also adduced overwhelming factual evidence that at least five defendants – Ciccone, Casarino, Bondi, Orsino, and Brancato – were involved in the bookmaking business, and also adduced independent evidence as to the involvement of Malara and Lisi. *See supra* pp. [34-36]; *see infra* pp. [85-86].

1 form of credit or promise directly or indirectly contemplating transfer of money or property or of
2 any interest therein.” N.Y. Penal Law § 225.00(6). A “contest of chance” is defined as a “game
3 . . . in which the outcome depends in a material degree upon an element of chance,
4 notwithstanding that the skill of the contestants may also be a factor therein.” N.Y. Penal Law §
5 225.00(1). Thus, in sum, an illegal gambling device is a machine that is used in an activity
6 where money (or something else of value) is staked upon the outcome of a contest that depends
7 in a material degree upon chance.

8 On appeal, Bondi raises several arguments as to why the government failed to adduce
9 sufficient evidence that the joker-poker machines in question were illegal gambling devices.
10 First, he contends that there was no evidence that people who played the machines actually
11 received something of value from them. Second, he argues that the games in question were
12 games of skill rather than contests of chance. Both of these arguments lack merit. As to Bondi’s
13 “something of value” argument, the government adduced evidence that customers of the
14 machines in question would purchase credits to play the machines, that they would receive
15 credits if they won, and that they could ultimately redeem these credits for cash. *See supra* pp.
16 [36-37]. Thus, there is no question that the customers risked something of value – money –
17 upon the outcome of the games played on the machines. As to Bondi’s argument that the games
18 were games of skill rather than chance, he fails to recognize that a “contest of chance”
19 encompasses games in which the skill of the contestants may play a role, as long as the outcome
20 depends in a material degree on chance. Bondi concedes that the games in question had the
21 theme of poker, and he has not contended in his brief that chance does not play a material role in

1 the outcome of a poker game.

2 Bondi also argues that there was no proof that the games in question were in fact joker-
3 poker games, pointing to the testimony of the government's expert witness, Detective Martin,
4 that he had not seen any "pure" joker-poker machines. This argument, however, misconstrues
5 Detective Martin's testimony. Detective Martin consistently referred to "joker-poker type
6 machines" as an umbrella term encompassing different types of illegal gambling machines. *See,*
7 *e.g.*, Tr. 3557-58. In the statement at issue, he was simply clarifying that he had not seen any of
8 the subset of joker-poker machines that involve playing poker with actual cards displayed on the
9 machine's screen (called "pure" joker-poker machines). Tr. 3569-70 (Q. "There are no pure
10 Joker-Poker machines that you have seen in this entire case, correct?" A. "Card machines, no,
11 but clearly machines, like Lucky Eight Lines.")

12 Finally, Bondi suggests that the indictment's gambling count referring to joker-poker
13 [Count 66] should have been dismissed because that count incorrectly referred to New York
14 Penal Law § 225.10 (which was relevant to the bookmaking charge), rather than New York Penal
15 Law § 225.30 or § 225.05. Bondi previously raised this argument to the district court, which
16 rejected it on grounds that under *United States v. Eucker*, 532 F.2d 249, 257 (2d Cir. 1976), "if
17 an indictment properly charges an offense, it is sufficient, even though an inapposite statute is
18 referred to therein." We agree with the district court's resolution of that issue. *See also* Fed. R.
19 Crim. P. 7(c)(3) ("Unless the defendant was misled and thereby prejudiced, neither an error in a
20 citation nor a citation's omission is a ground to dismiss the indictment or information or to
21 reverse a conviction.").

1 **12. The Witness Tampering Count [Ciccone]**

2
3 The final sufficiency-of-the evidence challenge is brought by Ciccone on the Witness
4 Tampering Count involving Anthony Frazetta (Bondi’s stepson). This count arose under 18
5 U.S.C. § 1512(b), the witness tampering provision of the federal Obstruction of Justice Act, 18
6 U.S.C. § 1501 *et seq.* Pursuant to 18 U.S.C. § 1512(b), it is unlawful to knowingly “intimidat[e],
7 threaten[], or *corruptly persuade*[] another person, with intent to . . . prevent the testimony of any
8 person in an official proceeding” (emphasis added). This Circuit has defined “corrupt
9 persuasion” as persuasion that is “motivated by an improper purpose.” *United States v.*
10 *Thompson*, 76 F.3d 442, 452 (2d Cir. 1996). We have also specifically stated that the
11 Obstruction of Justice Act can be violated by corruptly influencing a witness to invoke the Fifth
12 Amendment privilege in his grand jury testimony. *See United States v. Cioffi*, 493 F.2d 1111,
13 1118 (2d Cir. 1974).

14 In his brief, Ciccone argues that he was merely suggesting that Frazetta, who had every
15 right to invoke the Fifth Amendment privilege, do so, and argues that this suggestion was not
16 motivated by an improper purpose. We believe, however, that there was sufficient evidence
17 upon which a jury could conclude that Ciccone indeed had an improper purpose in “suggesting”
18 to Frazetta (via a command to his stepfather, Bondi, over whom he had authority under the
19 hierarchical structure of the Gambino Family) to plead the Fifth Amendment: Ciccone wanted to
20 ensure that Frazetta did not implicate him. *See supra* pp. [37-38]. We therefore reject Ciccone’s
21 challenge to his conviction on this count.

22 **C. The Defendants’ Other Challenges**

1 The defendants-appellants also raise several other challenges to their convictions, all of
2 which we reject.

3 **1. The *Crawford* Error**

4 Defendant-appellant Bondi argues that the admission of guilty pleas by co-defendants
5 Malara and Lisi as to the bookmaking counts violated *Crawford v. Washington*, 541 U.S. 36
6 (2004), therefore mandating reversal of his convictions on those counts.

7 It is undisputed that under *Crawford*, which was decided one year after this trial, the
8 admission of these guilty pleas – which were admitted for the purpose of showing that the
9 bookmaking business employed five or more people, a required element for conviction under 18
10 U.S.C. § 1955(b)(1) – was error. This Court has explained, however, that *Crawford* errors
11 should be reviewed under a “harmless error” standard. *See, e.g., United States v. McClain*, 377
12 F.3d 219, 222 (2d Cir. 2004) (“The erroneous admission of the three plea allocutions is therefore
13 reviewable for harmless error, and does not necessitate a new trial as long as the government can
14 show beyond a reasonable doubt that the error complained of did not contribute to the verdict
15 obtained.”) (internal quotation marks and citation omitted). In this case, we believe that the
16 admission of Malara’s and Lisi’s guilty pleas was harmless. Even absent any evidence as to
17 Malara and Lisi, there was overwhelming evidence at trial that five other defendants – Bondi,
18 Ciccone, Cassarino, Orsino, and Brancato – were involved in the bookmaking business. *See*
19 *supra* pp. [34-36]. (Additionally, there was also independent evidence adduced by the
20 government as to the involvement of Malara and Lisi. *See id.*)

21 The existence of this other evidence as to the involvement of at least five people in the

1 bookmaking business renders the *Crawford* error harmless. Accordingly, we reject this
2 challenge.

3 **2. The Wiretap Challenge**

4 The next argument brought by Bondi (and, presumably, joined in by the other defendants-
5 appellants) is that the district court erred in denying a motion to suppress the products of a
6 wiretap on co-defendant Cassarino’s cellular phone.¹⁶ The warrant for this wiretap was originally
7 authorized by Justice Nancy Smith of the New York Supreme Court, Appellate Division, Second
8 Department, on April 5, 2000. Justice Smith concluded, based primarily upon the affidavit of
9 Joseph Rauchet, Deputy Chief Investigator for the New York State Attorney General’s Task
10 Force on Organized Crime (“OCTF”), that there was probable cause to believe that Cassarino
11 and others were “committing and are about to commit the crimes of Promoting Gambling,
12 Possession of Gambling Records and Conspiracy to commit those crimes . . . and that evidence
13 of these crimes may be obtained by the interception and recording of . . . communications” on
14 Cassarino’s cell phone.

15 Before trial, Cassarino moved to suppress the fruits of this wiretap. The district court
16 denied that motion on December 18, 2002, concluding that probable cause supported the wiretap
17 and that even assuming that probable cause had been absent, the agents enforcing the warrant
18 relied in good faith upon it. This Court reviews that determination *de novo*. See, e.g., *United*
19 *States v. Smith*, 9 F.3d 1007, 1011 (2d Cir. 1993) (“On an appeal from a ruling on a motion to
20 suppress, we review a district court’s findings of historical fact for clear error, but analyze *de*

¹⁶Bondi raises this claim as an “aggrieved person” pursuant to 18 U.S.C. § 2518(10)(a).

1 *novo* the ultimate determination of such legal issues as probable cause and the good faith of
2 police officials in relying upon a warrant.”).

3 Here, we agree with the district court that probable cause supported the issuance of the
4 warrant for the wiretap. As noted above, the initial application for the wiretap was based upon
5 Rauchet’s lengthy and detailed affidavit. Rauchet set forth four categories of information
6 supporting a wiretap of Cassarino’s cell phone: (1) surveillance evidence; (2) analysis of
7 telephone toll records supplied by Sprint on the Cassarino cell phone; (3) Cassarino’s use of false
8 subscriber information on his cell phone; and (4) Rauchet’s own opinions, based on his
9 experience of over fifteen years investigating organized crime and gambling.

10 First, in terms of surveillance evidence, Rauchet described numerous instances of
11 meetings between Cassarino and high-level Gambino Family members, such as Louie Vallario
12 (an alleged “capo” in the Gambino Family), Brancato, and Ciccone. In fact, in one conversation
13 overheard by an OCTF Special Investigator, Cassarino and Brancato allegedly discussed football
14 gambling, that one location was making “barrels of money,” and that off-shore gambling
15 locations “could not be touched.” Second, in analyzing Cassarino’s Sprint records, Rauchet
16 described numerous calls between Cassarino’s cell phone and various high-level Gambino
17 Family officials. Third, Rauchet noted that Cassarino’s cell phone number was listed to
18 “Cassarino Prime” rather than Primo Cassarino, that it was linked to the contact address for
19 Jerry’s Café (an alleged meeting place for the Gambino Family) rather than Cassarino’s home
20 address, and that the Social Security number associated with the cell phone was off by one digit.
21 Rauchet stated that “[i]n my experience, those who utilize telephones to engage in illegal

1 activities often attempt to disguise their identities.” Fourth, based on his lengthy experience,
2 Rauchet set forth his opinions about the nature of the Gambino Family’s gambling enterprises,
3 and specifically opined that Ciccone (who, as a Gambino captain, had a higher profile) had used
4 Cassarino “to carry messages to and set up meetings with other members of the Gambino Crime
5 Family in order to guide and perpetuate gambling enterprises.”

6 Based on the above, we conclude that under the federal “totality of the circumstances”
7 standard, there was probable cause to conclude that Cassarino was engaged in criminal activity.
8 *See United States v. Rowell*, 903 F.2d 899, 902 (2d Cir. 1990) (holding that the relevant standard
9 for federal courts on motions to suppress evidence obtained under a state-issued wiretap warrant
10 is whether “the totality of the circumstances indicate a probability of criminal activity”). It is true
11 that, as Bondi argues, Rauchet’s affidavit included an incorrect statement: namely, that Cassarino
12 had been convicted of a Hobbs Act violation, when in fact Cassarino had only been *arrested* for a
13 Hobbs Act violation. (According to the government, this error occurred because a detective
14 misread Cassarino’s rap sheet to Rauchet over the telephone.) As the district court noted,
15 however, even without this misstatement, the affidavit still set forth ample evidence from which
16 to find probable cause. Bondi’s other arguments about “misstatements and omissions” contained
17 in Rauchet’s affidavit essentially amount to alternative explanations for Rauchet’s observations.
18 Although these explanations are not necessarily wholly implausible, they do not undermine the
19 notion that there was at least probable cause upon which the warrant could issue. We therefore
20 reject this challenge.

21 3. Partial Sequestration of an Anonymous Jury

1 Peter Gotti contends that the district court erred in empaneling an anonymous and
2 partially sequestered jury.¹⁷ The other defendants-appellants presumably join in this argument as
3 well.

4 The parties agree that in this Circuit, a court may order the empaneling of an anonymous
5 jury upon “(a) concluding that there is strong reason to believe the jury needs protection, and (b)
6 taking reasonable precautions to minimize any prejudicial effects on the defendant and to ensure
7 that his fundamental rights are protected.” *United States v. Paccione*, 949 F.2d 1183, 1192 (2d
8 Cir. 1991). “Within these parameters, the decision whether or not to empanel an anonymous jury
9 is left to the district court’s discretion.” *Id.*

10 Gotti does not argue that reasonable precautions were not taken to minimize prejudicial
11 effects. Nor can he, as the precautions set forth in *Paccione* – conducting a thorough voir dire
12 and providing the jurors with a plausible and nonprejudicial reason for not disclosing their
13 identities, *see id.* – were followed here. The district court made use of a juror questionnaire that
14 was jointly submitted, and instructed the jury that the special precautions had been implemented
15 to protect them from the inquiring media.

16 Instead, Gotti’s argument goes solely to prong one of the *Paccione* standard: whether
17 there was strong reason to believe that the jury needed protection. Here, the case law from this
18 Circuit makes clear that the district court legitimately found strong reason to believe that the jury

¹⁷The government originally moved for an anonymous and partially sequestered jury in a letter-brief dated October 30, 2002. Their submission was accompanied by the supporting affidavit of FBI Special Agent John P. Mullaney. On January 13, 2003, the district court issued a four-page Opinion and Order granting the Government’s motion and explaining its reasons for doing so.

1 needed protection, and that it therefore did not abuse its discretion by granting the government's
2 motion. *See Paccione*, 949 F.2d at 1192 (collecting cases and stating that sufficient reason for
3 empaneling anonymous juries has been found in cases where (a) “the defendants have been
4 charged with grand jury tampering and the trial is expected to attract publicity”; (b) “the
5 defendant has a history of attempted jury tampering and a serious criminal record”; (c) “there had
6 been extensive pretrial publicity and there were abundant allegations of dangerous and
7 unscrupulous conduct”; or (d) “the defendants were alleged to be very dangerous individuals who
8 had participated in . . . mob-style killings and there was strong evidence of the defendants’ past
9 attempts to interfere with the judicial process”) (internal citations and quotation marks omitted).
10 Here, the district court identified the following factors as relevant to its decision: (1) that the
11 defendants were charged with membership in a powerful crime organization, the Gambino
12 Family; (2) that the defendants included Gotti, the alleged head of the Gambino Family (whose
13 pretrial detention had already been ordered by the district court and affirmed by this Circuit due
14 to “dangerousness”¹⁸) as well as Ciccone, a Gambino Family captain, whose pretrial detention
15 had similarly been ordered by the district court due to dangerousness, *United States v. Ciccone*,
16 No. 02 CR. 606, 2002 WL 1575429 (E.D.N.Y. July 16, 2002); (3) that the indictment itself
17 charged two defendants with witness tampering in connection with grand jury testimony; and (4)

¹⁸In *United States v. Gotti*, 219 F. Supp. 2d 296, 299-300 (E.D.N.Y. 2002), a related proceeding in which the district court had upheld the pretrial detention of Peter Gotti, the district court had specifically stated that Peter Gotti was the alleged “Acting Boss of the Gambino Family” and that on the basis of Second Circuit precedent, he was obliged to rule that Peter Gotti should be detained. We affirmed, while disavowing the notion of a per se rule regarding purported Mafia crime bosses, and reiterating the need for a fact-specific inquiry (which, in this case, warranted detention). *United States v. Ciccone*, 312 F.3d 535, 542-43 (2d Cir. 2002).

1 that there was expected to be intense media coverage and public interest in the trial. The
2 presence of these factors unquestionably made this case one in which the district court had the
3 discretion to empanel an anonymous and partially sequestered jury. We therefore reject this
4 challenge as well.

5 **III. CHALLENGES BY THE DEFENDANTS AND THE GOVERNMENT TO THE** 6 **DEFENDANTS' SENTENCES**

7
8 We turn finally to the challenges brought by the defendants-appellants (and, in the case of
9 Peter Gotti, the government) to the sentences imposed by the district court in this case. As noted
10 above, we need not address Richard G. Gotti's sentence, which was already remanded to the
11 district court in a prior proceeding.

12 **A. Peter Gotti**

13 **1. Peter Gotti's Challenges to His Sentence and Forfeiture Order**

14 Peter Gotti challenges both the length of his sentence and the \$3,749,250 forfeiture order
15 against him. With regard to his various challenges to the judicial fact-finding that influenced the
16 calculation of his Guidelines sentence, we vacate his sentence pursuant to *United States v.*
17 *Crosby*, 397 F.3d 103 (2d Cir. 2005), so that the district court can determine whether to
18 resentence him.

19 We reject, however, his contention that the forfeiture order should be vacated and
20 remanded for recalculation. In this regard, Peter Gotti argues solely that the order was excessive,
21 because his RICO convictions stemmed solely from his money laundering convictions, and he
22 was not convicted of the more lucrative aspects of the racketeering scheme, such as the
23 ILA/MILA extortions and frauds.

1 Initially, we note that Peter Gotti did not raise this argument at trial. Therefore, we must
2 review it under a plain error standard, which requires a showing that there was an error, that it
3 was plain, that it affected substantial rights, and that it seriously affected the fairness, integrity, or
4 public reputation of judicial proceedings. *See, e.g., United States v. Williams*, 399 F.3d 450, 454
5 (2d Cir. 2005).

6 Here, we do not believe that there was error, let alone plain error. Peter Gotti was
7 convicted of racketeering and racketeering conspiracy under 18 U.S.C. § 1962. Under 18 U.S.C.
8 § 1963(a)(3), a defendant who is convicted of 18 U.S.C. § 1962 is to forfeit “any property
9 constituting, or derived from, any proceeds which the person obtained, directly or indirectly,
10 from racketeering activity or unlawful debt collection in violation of section 1962.” The district
11 court expressly found that it was reasonably foreseeable to Peter Gotti that the racketeering
12 enterprise in which he participated would engage in activities such as those underlying the
13 ILA/MILA Counts. *See* March 26, 2004 Sentencing Tr. at 57-59. That finding is supported by
14 the evidence adduced at trial and is sufficient to support the challenged forfeiture order. *See,*
15 *e.g., United States v. Fruchter*, 411 F.3d 377, 384 (2d Cir. 2005) (stating, in challenge to RICO
16 forfeiture amount, that “[s]o long as the sentencing court finds by a preponderance of the
17 evidence that the criminal conduct through which the proceeds were made was foreseeable to the
18 defendant, the proceeds should form part of the forfeiture judgment”).

19 **2. The Government’s Challenge to Peter Gotti’s Sentence**

20 When sentencing Peter Gotti, the district court concluded that under a preponderance of
21 the evidence standard, Gotti was the acting boss of the Gambino Family during all relevant times,

1 and determined that the ILA Counts, MILA Counts, Local 1 Counts, Howland Hook Counts,
2 Molfetta Counts, Tommy Ragucci Counts, Zinna Counts, Marinelli Counts, and Alayev Counts
3 constituted relevant conduct. March 26, 2004 Sentencing Tr. 40, 70-86. The district court also
4 said that it was going to impose a leadership role enhancement under U.S.S.G. § 3B1.1 to reflect
5 Gotti's leadership role in the enterprise. *Id.* at 67-72. When the sentencing resumed several
6 weeks later, however, the district court stated that it had changed its mind, and although it still
7 considered the various counts listed above to constitute "relevant conduct" for sentencing
8 purposes, it was no longer convinced that the leadership role enhancement was warranted. April
9 15, 2004 Sentencing Tr. 10-20.

10 The government argues that this change in position constituted error on the district
11 court's part. It acknowledges that the Guidelines are now advisory, and that Peter Gotti's
12 sentence will in any event be remanded to the district court under *Crosby*, at which point the
13 district court may ultimately choose to impose a non-Guidelines sentence. It argues, however,
14 that appellate review is still warranted at this juncture, so that the district court will – in the
15 context of reconsidering Peter Gotti's sentence under *Crosby* – be able to start with the correct
16 calculation of his Guidelines sentence. We agree that, in the interest of efficiency, it is
17 appropriate for us to address this issue now.

18 To evaluate the government's argument as to whether a leadership role enhancement had
19 to be imposed under the Guidelines, it is first necessary to look at the text of U.S.S.G. § 3B1.1.
20 U.S.S.G. § 3B1.1(a) provides for a four-level enhancement if "the defendant was an organizer or
21 leader of a criminal activity that involved five or more participants or was otherwise extensive."

1 U.S.S.G. § 3B1.1(b) provides for a three-level enhancement if “the defendant was a manager or
2 supervisor (but not an organizer or leader) and the criminal activity involved five or more
3 participants or was otherwise extensive.”

4 The commentary to this section is also instructive. First, the introductory commentary
5 notes that “[t]he determination of a defendant’s role in the offense is to made on the basis of all
6 conduct . . . and not solely on the basis of elements and acts cited in the count of conviction.”

7 Second, Application Note 2 provides that “[t]o qualify for an adjustment under this section, the
8 defendant must have been the organizer, leader, manager, or supervisor of one or more other
9 participants. An upward departure may be warranted, however, in the case of a defendant who
10 did not organize, lead, manage, or supervise another participant, but who nevertheless exercised
11 management responsibility over the property, assets, or activities of a criminal organization.”

12 U.S.S.G. § 3B1.1 app. n.2. Third, Application Note 4 provides that “[i]n distinguishing a
13 leadership and organizational role from one of mere management or supervision, titles such as
14 ‘kingpin’ or ‘boss’ are not controlling. Factors the court should consider include the exercise of
15 decision making authority, the nature of participation in the commission of the offense, the
16 recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the
17 degree of participation in planning or organizing the offense, the nature and scope of the illegal
18 activity, and the degree of control and authority exercised over others.” U.S.S.G. § 3B1.1 app.
19 n.4. Finally, the “background” states that “[t]his adjustment is included primarily because of
20 concerns about relative responsibility. However, it is also likely that persons who exercise a
21 supervisory or managerial role in the commission of an offense tend to profit more from it and

1 present a greater danger to the public and/or are more likely to recidivate.”

2 In explaining why it had decided not to impose a leadership enhancement on Gotti,
3 despite finding him to have been the “acting boss” and despite finding the various uncharged
4 conduct to constitute “relevant conduct” for sentencing purposes, the district court explained that
5 it did not “think it automatically follows that because somebody is the acting boss of the crime
6 family that he’s responsible for these four level enhancements in each and every relevant conduct
7 scenario.” April 15, 2004 Sentencing Tr. 11. The district court referred to Application Note 4’s
8 statement that “titles such as kingpin or boss are not controlling,” and its emphasis on actual
9 decision-making authority. It concluded:

10 The court understands this application note to mean that it is not enough for the
11 government simply to establish that Mr. Gotti held the position of acting boss, but rather
12 it must present some evidence to show an active role in his participation. Applying the
13 application note factors, the Court notes that none of them support – well, maybe with the
14 exception of one, support the finding that Mr. Gotti was an organizer or leader within the
15 meaning and intent of the guideline provision. . . .

16 The specific evidence put forward in this case strongly suggested that Peter Gotti
17 did not exhibit typical leadership characteristics that one would expect of the acting boss
18 of a New York crime family, but was simply filling a power vacuum brought about by the
19 incarceration of other members of the Gotti family. . . .

20 There’s simply no evidence before the Court that Mr. Gotti exercised decision-
21 making authority in the commission of these crimes constituting the relevant conduct,
22 that he participated in their commission. There’s nothing. In fact, the evidence shows
23 that he did not participate in their commission That he recruited any accomplices for
24 those particular crimes, that the tribute payments he received amounted to a larger share
25 of the fruits of the crime[,], is debatable.

26 *Id.* at 13-15.

27 On appeal, the government urges us to find error in the district court’s refusal to impose
28 the four-level enhancement. This Circuit has not always been consistent in describing the
29 standard of review for such determinations, *i.e.*, whether we review a district court’s decision not

1 to impose a leadership enhancement under a *de novo* or under a clear error standard. *See, e.g.,*
2 *United States v. Huerta*, 371 F.3d 88, 91 (2d Cir. 2004) (collecting cases, and noting the
3 divergence among various panels of this Court). In *Huerta*, we ultimately declined to reach the
4 question, on grounds that we would reach the same result regardless of which standard applied.
5 *Id.* Subsequently, we held that, as a general matter, in determining the appropriate standard of
6 review for a district court’s application of the Guidelines to the specific facts of a case, we should
7 follow an “either/or approach,” adopting a *de novo* standard of review when the district court’s
8 application determination was primarily legal in nature, and adopting a “clear error” approach
9 when the determination was primarily factual. *See United States v. Vasquez*, 389 F.3d 65, 75 (2d
10 Cir. 2004). Since the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005),
11 which rendered the Guidelines advisory rather than mandatory, we have continued to follow this
12 “either/or” approach. *See, e.g., United States v. Selioutsky*, 409 F.3d 114, 118-119 (2d Cir. 2005)
13 (explaining that “even under the post-*Booker* sentencing regime, calculation of a correct
14 Guidelines sentencing range will normally be part of the process of determining an appropriate
15 sentence”; that our appellate review of a sentence will therefore include an evaluation of the
16 district court’s Guidelines calculation; and that in performing such an evaluation, we will
17 “review issues of law *de novo*, issues of fact under the clearly erroneous standard, [and] mixed
18 questions of law and fact either *de novo* or under the clearly erroneous standard depending on
19 whether the question is predominantly legal or factual”) (internal citations omitted).

20 In this case, we believe that the clear error standard is appropriate, because the district
21 court’s application of U.S.S.G. § 3B1.1 to the facts of this case presents an issue that is

1 predominantly factual rather than legal. Indeed, although the government asserts in its brief that
2 “there is no dispute about the relevant facts” and therefore suggests that de novo review is
3 appropriate, the government has basically devoted its argument to disagreeing – by reference to
4 other evidence – with the district court’s determination that Peter Gotti did not exercise a
5 sufficient level of control over the enterprise to be deemed an organizer or leader of the
6 enterprise.¹⁹ Regardless of whether we would have reached the same decision were *a de novo*
7 standard to apply, we do not believe that the district court committed clear error here.

8 **B. Ciccone**

9 Pursuant to *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005), we vacate Ciccone’s
10 sentence and remand his case for resentencing.²⁰ We note that Ciccone has raised numerous
11 arguments as to the district court’s calculation of his Guidelines sentence, and that he also asserts
12 that certain of these arguments similarly invalidate the restitution and forfeiture orders imposed
13 against him. Rather than addressing those issues at this juncture, we believe that the more
14 prudent course is to let the district court pass upon them in the first instance when resentencing
15 Ciccone. *See, e.g., Fagans*, 406 F.3d at 141 & n.2. Because these arguments are also the bases
16 of some of his challenges to his restitution and forfeiture orders, the district court, if it is so

¹⁹For example, although the district court found that there was “no evidence before the Court that Mr. Gotti exercised decision-making authority in the commission of these crimes,” April 15, 2004 Sentencing Tr., the government argues in its brief that Peter Gotti’s position as acting boss “entailed substantial control over the criminal activities of the Gambino family rank and file,” including “supervis[ing] extortionate activity by the Gambino Family.”

²⁰Ciccone’s sentence is remanded pursuant to *Fagans* rather than *Crosby* because, as both Ciccone and the government agree, Ciccone (unlike Peter Gotti) objected, prior to sentencing, to the compulsory application of the Guidelines.

1 inclined, may revisit those calculations as well.²¹

2 **C. Bondi**

3 Bondi and the government are in agreement that Bondi, like Ciccone, is entitled to
4 resentencing pursuant to *Fagans*. We therefore vacate Bondi's sentence and remand his case for
5 resentencing.

6 **IV. CONCLUSION**

7 We have considered all of the defendants-appellants' contentions on these appeals and
8 have not found any basis for reversing their convictions. In light of the Supreme Court's
9 decision in *Booker* and this Court's decisions in *Crosby* and *Fagans*, we remand Peter Gotti's
10 sentence to the district court for consideration of whether to resentence pursuant to *Crosby*, and
11 we remand Ciccone's and Bondi's sentences to the district court for resentencing pursuant to
12 *Fagans*.

13
²¹We do note, however, that to the extent Ciccone argues that the restitution and forfeiture orders violate the Sixth Amendment because they were based on factual findings made by the district court under a preponderance of the evidence standard, that argument has already been considered and rejected by this Circuit. See *United States v. Reifler*, 446 F.3d 65, 113-20 (2d Cir. 2006) (holding that the Sixth Amendment right to a jury trial is inapplicable to restitution imposed under the Mandatory Victims Restitution Act); *Fruchter*, 411 F.3d at 380-83 (same, for forfeiture).